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Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

RALPH REA, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Matthew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt,

Petitioners,

vs.

MARGARET FORAN, now known as Margaret M. Catcher, Mary Martin, Mary Fallon, Joseph Fallon, John Murnan, known as David Murnan, Julia Hurst, Margaret Murnan, Julia Meager, Herman Murnan, Paul Murnan, Jerry Murnan, John Murnan, Mary Murnan, James Murnan, Thomas Murnan, Dorothy Firoben, Ragina McDonough and Katherine McDonough.

Respondents Associated in Interest with Petitioners,

WILLIAM B. DEVANNEY, Lulu Devanney, Daisy Devanney Pike, William B. Devanney, as Executor under the Last Will and Testament of James Devanney, Anna McDonough Aplin, Lawrence McDonough, James McDonough, Fred McDonough, Edward McDonough and Raymond W. Kilbourne, Executor of the Estate of Grace Backenstoe Murnan, Deceased, Margaret Fallon Lunn and Grace D. Backenstoe, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Ralph Rea, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Matthew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and

Ruth Hirt, respectfully pray for a writ of certiorari to be addressed to the Supreme Court of Ohio, the court in which the record is now lodged under provisions of Section 237 (b) of the Judicial Code, as amended, under the Act of February 13, 1925, U. S. C., title 28, section 344 (b) (8 F. C. A., title 28, para. 344 (b)), and Rules of Practice and Procedure.

The final order and judgment in the Supreme Court of Ohio in this cause was rendered and entered on the 17th day of March, 1943. This petition is filed in this court on the .. day of ....., 1943. The certified transcript of the record in the case and the proceedings in the Supreme Court of Ohio are herewith transmitted with this petition.

SUMMARY STATEMENT.

A brief statement of the undisputed facts of the case are as follows:

For many years prior to 1919, Mrs. Grace Backenstoe, the legal ancestor of the respondents herein, operated a large house of prostitution in Columbus, Ohio. In 1912 she went to Cleveland, Ohio, for the purpose of opening a house of prostitution. While there, she obtained an alleged divorce from George Backenstoe, her husband, in the Insolvency Court, a limited statutory court, upon an affidavit for service by publication sworn to before her attorney of record, as found by the Court of Appeals, Franklin county, Ohio. This act, under the applicable statutes and the law as declared by the Ohio courts, rendered the affidavit void. She then returned to her house of prostitution in Columbus. While still conducting that house of ill fame she maintained a meretricious relation-

ship with M. P. Murnan, and she and Mr. Murnan, the legal ancestor of your petitioners, took an automobile trip to the San Francisco fair.

At the first trial of this cause, while alive, Mrs. Backenstoe, under oath in a deposition claimed that while returning from this trip she had married Mr Murnan by statutory license and ceremony, before one witness, at Flagstaff, Arizona, in July, 1915; that that was her only marriage to Mr. Murnan; that she never had any papers established by the statutes of Arizona, evidencing said marriage. **There was no record whatever, as required by the statutes of Arizona, of said claimed marriage or the issuance of a license.** No papers, authenticated or otherwise, were produced in evidence of said marriage. The Arizona statutes specifically prohibited common law marriages. Further, for some time prior to July, 1915, and as found by the Court of Appeals and Court of Common Pleas of Franklin county, Ohio, she had maintained a meretricious relationship with Mr. Murnan.

Upon their return to Columbus, the two immediately separated; Mrs. Backenstoe returned to her house of prostitution conducting her own business until after 1919 staying at her own home even after houses of prostitution had been closed by governmental authorities. Mr. Murnan returned to his home with his mother on Eighteenth avenue in Columbus. **Until after 1919 both she and Mr. Murnan represented themselves to be single and unmarried in the execution of deeds, bank accounts and other legal papers, and each of them held himself or herself out to the public as such.** Thereafter they moved into a highly respected neighborhood and proceeded then, to hold themselves out and introduced themselves

as man and wife until the death of Mr. Murnan. She then claimed legal title and took possession of Mr. Murnan's $175,000 real estate as a surviving spouse. There were no children, or direct descendants.

STATEMENT OF CASE SHOWING DEVELOPMENT OF FEDERAL QUESTIONS RAISED.

A petition was filed in the Court of Common Pleas, Franklin county, Ohio on the twenty-eighth day of February, 1938 (page 5, record). Ralph Rea was the plaintiff, the heirs of M. P. Murnan, deceased, and Grace Backenstoe were named defendants. Though the petition is called "Petition in Partition" it contained two causes of action; one distinctly and exclusively an action at law in ejectment, as conceded by the respondent heirs of Grace Backenstoe and as recognized by the Court of Appeals, the other distinctly equitable as conceded by the respondent heirs of Grace Backenstoe. The petition alleged that Ralph Rea was seized in fee simple to the legal title of an aliquot part of the 17 parcels of real estate described in the petition.

First, as against Grace Backenstoe, petitioner alleged that she was in the possession of said real estate and claimed some interest therein and asked that Grace Backenstoe be compelled to set it up and that it be declared void. He also set up a claim for rents and profits collected by her while in unlawful possession.

Second, as against the other defendants, the heirs of M. P. Murnan, the plaintiff, alleged that they were tenants in common with your petitioner, asked that partition be had of such real estate.

Grace Backenstoe filed an answer (page 19, record) in

which she did not deny any of the allegations of the petition but set up new matter as a defense, alleging that she alone held the fee simple title to said real estate and held it as the surviving spouse of M. P. Murnan and prayed that the petition be dismissed. There were other answers filed before and after her death but they did not alter or change **the only** issue raised by the answer filed by Grace Backenstoe. To that answer of Grace Backenstoe a reply was filed denying the new matter set up as a defense.

The case came on for trial and the only controversy and issue heard and tried at any time was that **in ejectment, at law,** between your petitioners and Grace Backenstoe. There was no issue raised or tried among your petitioners and those associated in interest as to their respective rights in partition in the property, after the possession thereof was recovered, by the action at law, from Grace Backenstoe.

This trial resulted in a non suit. Your petitioners were not permitted to offer any evidence that Grace Backenstoe was not the surviving spouse of M. P. Murnan. Upon appeal, at law, to the Court of Appeals that judgment was reversed and the cause remanded for another trial. Prior to the second trial Grace Backenstoe died. After her death the action was revived in the names of respondents.

The second trial in the Common Pleas Court was had without the intervention of a jury. The only controversy arising and issues tried then, was the action, **at law, in ejectment.**

At the trial an issue was raised by the evidence introduced by the petitioners showing that an alleged divorce

procured by Grace Backenstoe in Cleveland, Ohio, in 1912, was secured without jurisdiction, apparent upon the record in the court and was therefore void.

The second trial court, His Honor, Turner, Judge, decided the cause, being No. 154482, and upon request of the heirs of Grace Backenstoe, the court made a finding of fact and conclusions of law (page 75, transcript).

The court found therein, that by stipulation of counsel, the issue was limited to the question whether or not Grace Backenstoe, otherwise called Grace D. Murnan, was the **sole heir at law** of M. P. Murnan and the **lawful spouse** of M. P. Murnan; that the heirs of M. P. Murnan, as named in the petition are entitled to the legal title and possession of the real property involved; that the laws of Arizona require the issuance of a license, certificate of marriage, two witnesses, and marriage before a person duly authorized and that a record be made of the same and that common law marriages were prohibited; that Grace Backenstoe was not the surviving spouse of Murnan and was not married to him according to the statutes of Arizona, or by common law, that there was no record of such marriage as required by such statute, that the records of Arizona disclose no license was issued to either Murnan or Grace Backenstoe or Grace Daugherty; that she testified that that was her only marriage to Murnan.

The court then entered judgment at law for legal possession and title in the heirs of M. P. Murnan against the heirs and devisees of Grace Backenstoe and rendered judgment against her for $18,000 rents. He then decreed partition among the heirs of M. P. Murnan.

An appeal was then taken to the Court of Appeals of Franklin county, Ohio, by the heirs of Grace Backenstoe, as upon questions of law and fact **in chancery** under Article 4, Section 6, of the Ohio Constitution, as amended in the year 1912, and also an appeal on questions of law (pages 96-97, record).

Your petitioners (page 98, transcript), thereupon filed a motion to dismiss the appeal on law and fact and on law, specifically asserting, that the court had no jurisdiction to try the appeal on questions of law and fact. The court overruled that motion (page 100, transcript). Entry on motion (page 107, transcript). By order of the court, over the objections of your petitioners (record, page 108), the cause was set down and tried as a case in chancery, de novo, **on the sole issue of ejectment at law,** and upon the transcript of the testimony taken in the court below and upon depositions taken under said order. Most of the testimony taken by deposition in the Court of Appeals by the respondents was cumulative on the claim that Mrs. Grace Backenstoe and Mr. Murnan held themselves out as man and wife after 1919 and had that reputation among their friends and neighbors. The court rendered its decision March 12, 1942, in favor of respondents (page 210, transcript).

Upon specific request by your petitioners (page 246, transcript), the court announced a decision, April 17, 1942, purporting to incorporate findings of fact and conclusions of law (page 250, transcript).

On April 29, 1942, your petitioners filed an objection to the proposed finding of fact (page 259, transcript) and made a demand in writing in the same paper for a finding of fact and conclusion of law in conformity to their

former application and motion and in accordance with the statutes and law applicable to the record, and attached thereto a suggested finding of facts and conclusions of law.

On May 23, 1942, before judgment was rendered, your petitioners filed a supplemental request and demand for findings of fact and conclusions of law applicable thereto, and noted their exceptions and objections to the proposed judgment entry submitted by the respondents (page 265, record).

In the supplemental request your petitioners specifically noted their objections and exceptions, that the proposed finding and decision was not sufficient in law to support any judgment which the court might assume to render and as being **in violation of the constitutional rights of your petitioners under the Fourteenth Amendment to the United States Constitution** (page 268, transcript), and that any judgment rendered thereon and therein would be rendered without jurisdiction of the court, on the record, a denial of due process of law; of the equal protection of the laws and of the taking of the property of your petitioners.

Your petitioners further objected an exception that the Court of Appeals was bound by the finding of facts and conclusions of law of the trial court and the judgment it rendered unless manifest error intervened (page 269, transcript).

Your petitioners filed a motion before judgment further objected and asserted that (page 271, transcript), including an exception to the finding of fact and conclusions of law of the Court of Appeals as contained in its decision of April 17, 1942, and moved the court to answer 37 specific interrogatories

addressed to it, material to the issue raised by the petition in order that a reviewing court might determine whether manifest prejudicial error intervened as specifically required by Section 1223-30, Ohio General Code, among which were the following:

> "10. Was a marriage license issued for the marriage of Maurice P. Murnan and Grace Backenstoe, or Grace Daugherty in Conconio county, Flagstaff, Arizona, in 1915."

Then follows several questions as to when and to whom any license was issued and where and who and how said ceremony was performed. Also:

> "18. If a ceremony was performed, did the person performing it endorse the solemnization of the rites of matrimony upon said license and make return of the same to the office of the clerk of the Superior Court of Conconio county, Arizona, at any time?
>
> "19. Was there a marriage certificate evidence of such marriage executed by the person performing the ceremony and signed by two witnesses?
>
> "20. Did Grace Backenstoe receive, after such alleged marriage ceremony, any papers relating to any such marriage?
>
> "21. If a marriage license was issued, what became of it?
>
> "22. If a marriage certificate was executed, what became of it?
>
> "23. Was any part of the marriage record of Conconio county, Arizozna, lost, destroyed or stolen? And which?
>
> "26. Are the marriage records of the clerk of Superior Court of Conconio county, Arizona, complete for the years 1912 to 1920?"

All of these motions and objections were overruled, and the court refused to answer the interrogatories, and denied the constitutional claims asserted.

Thereafter, judgment was entered embracing a finding of fact and conclusions of law (page 276, transcript).

The judgment entry of the Court of Appeals contained **four separate findings of fact, A DIFFERENT ONE BY EACH JUDGE.**

There is no finding by the court of the issuing of a license or of a statutary marriage in the findings of fact and judgment entry and decree, and no attempt to make any finding of any license or marriage until the specific separate and different findings made by each separate judge.

The majority of the Court of Appeals found that the laws of Arizona, pertinent to the issue, in force in 1915, were as stated in the judgment entry and decree (R., 279), and that the following sections were included:

"12. That the laws of Arizona in force and effect in 1915 were:

> "Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."
>
> "Section 3844. **The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid, unless a license be issued as provided in this chapter,** and a marriage solemnized by one of the persons authorized by law or by one purporting to act in the capacity of a clergyman, judge or justice and be-

lieved in good faith by at least one of the parties, to be such."

The majority Court of the Appeals then found:

> "13. **The marriage records in the Supreme Court for Conconio county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan, or Grace Backenstoe, or Grace Daugherty. There is no record of said marriage in the office of the clerk of the Superior Court of Conconio county, but the absence of said record MAY BE accounted for by the failure of the justice, OR of the parties to return the license and a certificate of the solemnization of the marriage to said clerk of courts, OR the failure of the clerk to make a record thereof, upon the return of said license."**

The majority of court then found that both parties were well known underworld characters—the leaders in their respective spheres of gambling and owning and operating a house of prostitution and then specifically finds:

> "15. * * * **The relations between these parties prior to July, 1915, were meretricious," and that they each gave deeds and other papers in their respective names, as single and unmarried individuals from July, 1915, until August, 1919.**

After the foregoing, each separate individual judge made separate and different findings, as follows:

> "18. To sustain the foregoing findings of fact, viz., that Maurice P. Murnan and Grace Backenstoe **were husband and wife at the time of the decease** of Maurice P. Murnan.
>
> **"Geiger, P. J., finds, that a common law marriage existed between the parties after 1919,** established by their open assumption of the relations of husband and wife—followed by cohabitation as such

and were so treated and reputed in the community and circle in which they moved—which relationship continued until the time of the death of Maurice P. Murnan and that this establishes a common law marriage between the parties, but might well corroborate a ceremonial marriage."

"**That Barnes, J., finds that on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Conconio county at Flagstaff,** and the marriage contract was entered into by said parties, and the marriage was solemnized by the justice of the peace in and for said county at Flagstaff, Arizona, that there was one witness to said marriage."

"That **Hornbeck, J., finds that an analysis of the essentials of proof will not permit of the determination that Grace Backenstoe and Pat Murnan were married in any form recognized by the law."**

The Court of Appeals also **made a finding of fact,** as to the issue of the alleged void divorce from George Backenstoe, **"that her attorney of record acted as notary in taking her affidavit for service for publication"** upon which the alleged service was made, and that the decree of divorce in that case, nevertheless, is valid and binding, and could not be collaterally attacked, since no direct attack was made and no indirect attack, except in the evidence but not by the pleadings, in this case.

Thereafter follows what purports to be the judgment, **continuing to recognize the separate, different, inconsistent findings of fact, as follows:**

"It is therefore, ordered, adjudged, and decreed upon the foregoing finding of fact by the Honorable J. D. Barnes, J. J. of this court, and of the Hon.

> Frank W. Geiger, P. J., that a marriage existed between the said Maurice P. Murnan and Grace Backenstsoe; that the majority of this court, namely Geiger, P. J., and Barnes, J., **finds that at the time of the death of Maurice P. Murnan, the said parties were husband and wife** to which finding of fact his Honor, Judge Hornbeck, dissents."

No judge and no court made any finding that there was any claim of any contract "in presenti" of a common law marriage as required by the Ohio law.

Nowhere does the court find that Grace Backenstoe and M. P. Murnan were married at Flagstaff, Arizona, in July, 1915, according to the laws of Arizona.

In the decision March 12, 1942, Barnes, Judge, stated: that **as to Grace Backenstoe the issue was the question of the possession of the real estate and the question of the rents and profits received by her** and as to all other defendants the prayer was for partition. (R., page 211.)

After judgment was entered, and during term, petitioners filed a motion (page 290, transcript), to set aside and vacate its judgments, entered June 6, 1942, and April 4, 1941, on the ground that the court was without jurisdiction on the record, under the Ohio Constitution to have heard law case i. e. ejectment, **de novo**, and to render the judgment which it did render, and that the action of the court in trying and hearing the case and in rendering the judgment it did render, on the record, was **a violation** of the guarantee set out in **the Fourteenth Amendment** to the United States Constitution and the equal protection of the law.

The Court of Appeals rendered a decision (page 294, transcript), on said motion and entered judgment overruling and denying the same (page 298, transcript).

Thereafter (page 303, transcript), petitioners filed an appeal as of right with an assignment of errors, in the Supreme Court of the state of Ohio, under Article 4, Section 2 of the Ohio Constitution and simultaneously filed a motion to certify the record of the Court of Appeals of Franklin county, Ohio, (page 300, transcript).

In the brief of the petitioners filed in the Supreme Court among the errors assigned and questions presented and decided was the specific claim that the action of the Court of Appeals was a **violation of Article 4, Section 1**, of the Constitution of the **United States** in that the Court of Appeals failed and refused to give full faith and credit to the public acts and records of the state of Arizona material and determinative of the issues in this case, **by by-passing the law of Arizona providing that no marriage shall be valid unless a marriage license shall first have been issued and a certificate executed and returned evidencing said statutory marriage.**

The court rendered a decision overruling said motion and dismissing said appeal. 140 O. S., 546. Thereafter an application for rehearing was filed which was denied.

Upon leave of court (pp. 312-314, transcript), a second application for a rehearing was filed and granted. In the second application for a rehearing the appellants specifically set up and renewed the constitutional question that the Court of Appeals was without jurisdiction to hear and try this cause in chancery on the record; that the Court of Appeals was without jurisdiction on the record to have rendered the judgment it did render; that the same was **a violation of** the guarantee set forth in the **Fourteenth Amendment** to the **United States Constitution.** Appellants also specifically set up the con-

stitutional question that the Court of Appeals refused to give full faith and credit to the public acts and records of the state of Arizona as applicable to the undisputed facts of record in this case and was **a violation of Article 4, Section 1** of the **Constitution of the United States.**

Thereafter, to wit on the seventeenth day of March, 1943 (p. 392, transcript), 141 O. S., 476, **by a divided court,** final judgment was entered against the petitioners, overruling the motion to certify the record of the Court of Appeals of Franklin county, Ohio, and dismissing the appeal filed as of right, stating that **no debatable** constitutional question was involved.

In the trial court the defendants produced one Homer Byers who was the chauffeur and who testified that he saw a **marriage CONTRACT and bond at the clerk's office at the court house, at** Flagstaff, Arizona.

In the decision of Judge Barnes in the Court of Appeals (each judge rendering a separate opinion), Barnes said:

> "It was the view of the trial court that this witness is not worthy of belief. **If, we were reviewing as on error proceedings,** we would accept this view of the trial court without question, **but since we are determining the matter de novo,** we cannot overlook the omission of this impeaching testimony." (Page 225, transcript.)

In Judge Turner's finding supra, he **found that Byers committed perjury in the trial** and was paid compensation for his time in testifying. Judge Barnes also stated at the same time as making the above statement that Byers "saw too much."

Judge Turner, was the prosecuting attorney when Byers originally admitted his perjury in 1911.

This statement by Judge Barnes, shows how all important, to the petitioners, is the effect of the **arbitrary assumption of jurisdiction** to try the case **de novo** in the Court of Appeals, and the resulting violation of the Fourteenth Amendment to the United States Constitution whereby the property of your petitioners is being taken without any due process of law and the **denial of the equal protection of the laws** and without compensation.

In the appellate court, the deposition of one Louis Novaro (p. 156, R.) "taken as rebuttal testimony" was introduced who testified that he was a frequenter of Grace's house of prostitution and her good friend and **that when he was told of the alleged marriage he could not believe it.** To prove this fact, he said, **Grace took a paper from a wall safe in her bedroom which to him looked like a marriage CERTIFICATE issued by the state of Arizona. No such paper was ever produced by Grace and she testified while alive that she never had any marriage papers.** Novaro also admitted that in 1912, though he knew the business of Grace Backenstoe, while he was a deputy clerk of the Court of Common Pleas of Cuyahoga county, he appeared as a character witness for her in the Cleveland divorce case, and assisted Grace in getting her alleged divorce; that when she went to Cleveland in 1912, she went to him and asked him to help get her started in a house of prostitution. No one produced, and no individual was produced, showing a single duly authenticated document concerning said alleged marriage specifically required by the statutes of

Arizona. The undisputed testimony of the clerk shows the records in Arizona are complete (pages 25 and 109, record) and there is no marriage license issued to either of these parties. In the instances of the alleged marriage **contract** and **certificate**, neither purported to be a license and no evidence was offered to authenticate or establish the verity of either.

THE CONSTITUTIONAL QUESTIONS INVOLVED.

There are two fundamental questions arising under the Constitution of the United States on the record, presented seasonably to the Court of Appeals and to the Supreme Court of Ohio, the highest court of the state, in which a final decision could be had thereon, and such court and courts finally decided adversely to the petitioner and his co-tenant heirs.

There was no constitutional question arising in or decided by the Court of Common Pleas.

I. The first question involved Article 4, Section 1 of the United States Constitution.

II. The second question involves the Fourteenth Amendment to the United States Constitution.

I.

The petitioners on the appeal as of right to the Supreme Court of Ohio, asserted in their briefs and errors assigned therein and applications for rehearing, that the Court of Appeals in rendering the judgment and decree which it did render on the record failed to give full faith and credit to the public acts and records of the state of Arizona. This question was also presented in oral argument before the court on the motion to certify and upon

the hearing of the motion to dismiss the appeal as of right.

The second question is subdivided into four parts, and arose as follows:

II.

(a) The law of the state of Ohio and the settled course of judicial procedings is that when one is asserting and claiming the legal title and the recovery of the possession of specific real estate, against one in adverse possession, that this is an action in ejectment at law only and **never was a chancery case** and the issues of fact therein are triable to a jury.

The **Constitution of Ohio, Article 4, Sections 2 and 6,** as amended in the year 1912, **specifically defines and limits the jurisdiction of the Supreme Court of Ohio and the Court of Appeals. The Court of Appeals is limited to try cases on appeal de novo, to chancery cases only.** Law cases must be taken on appeal on questions of law as upon petition in error. Cases wherein a constitutional question is asserted in the Court of Appeals are appealable as of right to the Supreme Court of Ohio.

The respondents on the record appealed only the judgment at law in **ejectment,** rendered by the Court of Common Pleas against them.

The only issue heard, tried and decided in the Court of Appeals was the issue **in ejectment, as to legal title and the recovery of the possession of specific real property** described in the petition.

It was specifically asserted in the Court of Appeals, both before and after judgment, and in the Supreme Court, that since the Court of Appeals did not have jurisdiction apparent on the record to hear and determine this

cause, on appeal DE NOVO, as a case in chancery, that to do so was to deny the petitioners due process of law and the equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution, being arbitrary and a denial of the equal application of the law on the record.

(b) The Court of Appeals having arbitrarily assumed jurisdiction to try the case, **de novo**, as a chancery case was without jurisdiction, on the record, to render the judgment it did render and said judgment was rendered by denying due process of law and the equal protection and application of the law and a violation of the Fourteenth Amendment of the United States Constitution in this, to wit:

1. The petitioners made a request as provided by statute for a finding of material facts to which the law gives a conclusive, determinative effect, conclusive upon the issues, and conclusions of law sufficient in law to give the Court of Appeals jurisdiction to render any judgment or enter any decree, to wit:

Was Grace Backenstoe and M. P. Murnan lawfully married as required by the laws of the state of Arizona, July 15, 1915, and did she as such surviving spouse have the sole legal title to the real property described in the petition.

2. The court refused and failed to answer material interrogatories addressed to it, so as to make a finding of fact, essential to a valid judgment.

3. The finding, judgment and decree of Barnes, judge, as to a **statutory marriage** and of Geiger, judge, as to a **common law marriage**, is without any jurisdiction to try

the case, de novo and without evidence to support a contract of marriage **on either** ground.

4. Both the Court of Appeals and the Supreme Court by a final order and judgment held adversely to your petitioners on that constitutional question. All of this, it is claimed, is an arbitrary exercise of the powers of government and a denial of the equal application of the law on the record.

(c) Petitioners raised an issue in the Court of Appeals on the record, by the evidence, attacking the validity of the alleged divorce of Grace Backenstoe from George Backenstoe in the Insolvency Court of Cleveland, Ohio. It was asserted and being apparent on the record that George Backenstoe was a non-resident of Cuyahoga county, Ohio; **that no personal service was had upon him and no affidavit for service by publication was filed therein as specifically required by the General Code of Ohio, and that said court was therefore without jurisdiction to grant any divorce therein and that the alleged decree of divorce was void.** It was further asserted that to give efficacy and binding force to this void judgment of divorce would and did result in the taking the property of the petitioners without compensation; without due process of law and was a denial of the equal protection of the laws and therefore, a violation of the Fourteenth Amendment to the United States Constitution, being arbitrary and a denial of the equal application of the law on the record.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Ohio has erred in deciding a federal question of substance, where the United States Supreme Court has not heretofore determined the questions and has declared principles and has applied principles not in accord with the applicable federal decisions.

Van Huffel v. Harkelrode, 284 U. S., 225-230.
John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S., 178, 181-183.
Aetna Life Ins. Co. v. Duncan, 266 U. S., 389, 393, 394.
Murdock v. Memphis, 20 Wall (U. S.), 590, 635, 636.
Scott v. McNeal, 154 U. S., 34, 40.
Davis v. Weshler, 263 U. S., 23, 24.
Windsor v. McVey, 93 U. S., 274-277.
Harris v. Hordeman, 14 Howard (U. S.), 334, 341.
U. S. v. Walker, 109 U. S., 258, 267.
Williams v. F. Cowling, 63 Sup. Rep., 207.
Yick Wo v. Hopkins, 118 U. S., 356, 369, 370.

I.

2. Article 4, Section 1 of the Constitution of the United States provides that every state shall give full faith and credit to the public acts and records of every other state.

The Supreme Court of the United States and the federal courts have declared that when a statute of a state prescribed, defines or limits the things which are essential and effective to create a binding contract, that it is essential that in any court in any state wherein remedy is sought under such contract that the essential requisites of the statute must be found in order to constitute a binding contract and that they be sustained by evidence

rather than mere surmise, conjecture, suspicion or experiments of the trial judge. This court has also asserted that where the findings of facts and conclusions of law are so intermingled with a claim of federal right as to make it necessary in order to pass upon and determine the federal question asserted, that the Supreme Court of the United States will analyze the facts in order to determine whether a federal right asserted in the state courts has been denied as a result of a finding shown by the record to be without any evidence sufficient in law to support it.

The Constitution of the United States, Article 6, says that the Constitution shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding.

To permit the courts of the state of Ohio, to ignore the statutes of the state of Arizona and the public records therein by holding **that the absence of the essentials of a marriage record required by statute MAY BE accounted for** by the failure of the public officials of that state to perform their solemn duty, or the failure of the parties to do something **without any evidence of any kind whatsoever,** to sustain such a finding, **and when the undisputed evidence shows that the records as required by the statutes are complete, is to permit one state to bypass the laws of another state by surmise, conjecture, suspicion and guess on the part of the court and a violation of the constitutional guarantee of full faith and credit to be given to such public acts and records.** Assuming the unsoundness of the action of the Supreme Court of Ohio, in this matter, and of the Court of Appeals,

it is probable that such action will be cited as a precedent in other states as a reason for ignoring this provision of the federal Constitution.

3. (a) By a long line of decisions, applicable to the pleadings and the record in this cause, it is and has been the settled law in Ohio and a part of due process under the law of Ohio, that when one party asserts the legal title to premises as against another who also claims the sole legal title and seizin and is in possession thereof, that the action, is an action in ejectment, at law, and triable only at law and that the issues of fact therein, by specific provision of statute, are triable to a jury.

(b) It is the settled law in Ohio that such an action is not an action in chancery and never has been.

The Constitution of the state of Ohio, Article 4, Section 6, provides that **chancery cases only are appealable and triable de novo.**

It is the settled law in Ohio that if the case in the Court of Common Pleas as tried and decided between the parties on the issue raised in the pleadings was primarily an action **in ejectment at law** and not a case in chancery that then the Court of Appeals under the Constitution of Ohio, is without jurisdiction to hear and try the case de novo, as a chancery case, and that when the question of the jurisdiction of the Court of Appeals to try such a case is raised before trial, before judgment, after judgment, all in term, and subsequently on appeal as of right is filed in the Supreme Court of Ohio, such appeal raises a question under the Constitution of the state of Ohio and must be heard upon its merits.

To dismiss such an appeal filed as of right without a hearing upon the merits is a denial of due process of law

and the equal portection of law, is arbitrary and a denial of the equal application of the law on the record and in violation of the Fourteenth Amendment to the United States Constitution.

(c) It is the established law of Ohio since its incorporation as a state that the jurisdiction and power of a court to render judgment or decree, and what judgment or decree it is required to enter upon its journal is determined solely by what facts are alleged and what issue is made by the pleadings. Under the pleadings and issues tendered in this cause between the petitioners and Grace Backenstoe and her heirs, the only issue tendered as conceded by respondents (page 39, brief) was the recovery of the possession of specific real property and the determination of the legal title thereto. **The only judgment which the Court of Appeals had power or jurisdiction to enter as between these parties was a judgment at law in ejectment affirming or reversing the judgment of the Common Pleas Court on that issue, as if the case had been appealed upon questions of law.**

The action of the Court of Appeals and of the Supreme Court of Ohio in denying the claims and rights of your petitioners, on the record, and in taking their property without jurisdiction on the record is so arbitrary and without support in and contrary to law or fact, on the record, as to be a denial of due process of law and the equal application of the law.

To deny this petition for the writ of certiorari would give added force to the action of the Ohio Supreme Court, assuming its unsoundness, because of the fact of the denial of certiorari would be referred to in future controversies or in other states being confronted by a

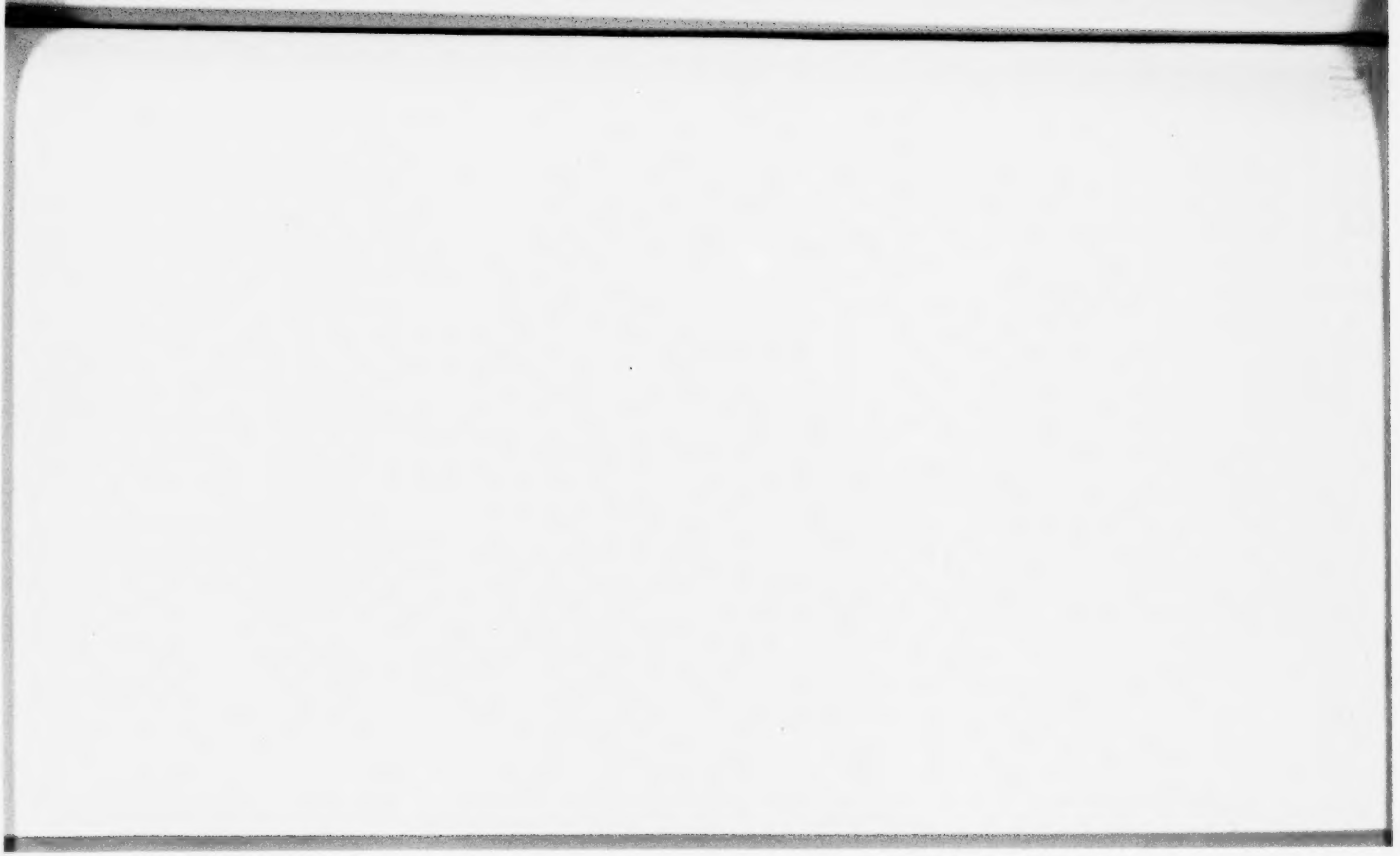
similar situation or state of the record and this fact makes it important that there be a final determination of the principles involved on the record under the Constitution by the United States Supreme Court.

(d) Under the Constitution of the state of Ohio, as amended in the year 1912, it is the settled law of the state of Ohio, that a judgment or decree of a court rendered without jurisdiction of the parties or the subject-matter is void and can be attacked at any time or in any court by anyone whose rights are affected thereby. The action of the Court of Appeals in this cause holding that the petitioners cannot collaterally attack the void judgment of the Insolvency Court of Cuyahoga county, Ohio, thereby enabling respondents to claim the property of M. P. Murnan as the heirs of his alleged surviving spouse, when as a matter of fact in law, **Grace Backenstoe was never in a position to marry M. P. Murnan**, is arbitrary, a denial of due process of law and a taking of property without due process of law, without compensation and a denial of the equal protection and application of the law and in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directing to the Supreme Court of the state of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and proceedings so far as it is material and pertinent to the questions and issues herein presented in the case numbered and entitled on its docket No. 29315, Ralph Rea, plaintiff-appellant, v. Margaret

Fornan, now known as Margaret N. Catcher, Marty Martin, Mary Fallon, Joseph Fallon, John Fallon, Margaret W. Smith, John Murnan, known as David Murnan, Julia Hurst, Margaret Murnan, Julia Meager, Herman Murnan, Paul Murnan, Jerry Murnan, John Murnan, Mary Murnan, James Murnan, Thomas Murnan, Dorothy Firoben, Ragina McDonough and Katherine McDonough, defendants, Mary Boland, Katherin Gruber, Anna Ford, Julia Galey, James Welsh, William Welsh, Mathew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt, defendants and appellants, William B. Devanney, Lulu Devanney, Daisy Devanney Pike, William B. Devanney, as executor under the last will and testament of James Devanney, Anna McDonough Aplin, Lawrence McDonough, James McDonough, Fred McDonough, Frank McDonough, Joseph McDonough, Charles McDonough, Edward McDonough and Raymond W. Kilbourne, executor of the estate of Grace Backenstoe Murnan, deceased, Margaret Fallon Lunn and Grace D. Backenstoe, deceased, defendants and appellees, and that said judgment of said Supreme Court of Ohio, may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

RALPH HENNEY,
JOHN A. CONNOR,
JOHN D. CONNOR,
MATTHEW L. BIGGER,
BENJAMIN F. LEVINSON,
Attorneys for Petitioners.



BRIEF.

OFFICIAL AND PRINTED REPORTS OF CASE IN STATE COURTS.

Rea v. Fornan, et al. 46 N. E. (2), 649; decision by Court of Appeals.

Rea v. Fornan, et al. 46 N. E. (2), 664; decision on motion for rehearing.

Rea v. Fornan, et al. 46 N. E. (2), 667; decision on motion to certify record and vacate judgment.

Rea v. Fornan, et al., 140 O. S., 546; decision on motion to dismiss petition on appeal.

Note: Official report shows that among other issues petitioner asserted failure of state courts to give full faith and credit to public acts and records of another state—Section 1, Article 4, U. S. Constitution, Section 6, Article 4, Ohio Constitution—due process and equal protection, Fourteenth Amendment, U. S. Constitution.

Rea v. Fornan, et al., 141 O. S., 476; decision on rehearing of motion to dismiss petition on appeal.

Note: Official report shows that among other issues petitioner asserted failure of state courts to give full faith and credit to public acts and records of another state—Section 1, Article 4, U. S. Constitution, Section 6, Article 4, Ohio Constitution—due process and equal protection, Fourteenth Amendment, U. S. Constitution.

CONSTITUTIONAL QUESTIONS INVOLVED.

Ground for Jurisdiction.

The grounds under which jurisdiction of this court is invoked are as follows:

That the Supreme Court of the state of Ohio deprived your petitioners of their property without due process of law and without compensation and the equal protection of the law guaranteed to petitioners by the Fourteenth Amendment of the Constitution of the United States when it sustained a motion to dismiss, and refused to hear on its merits, as required by the Ohio Constitution, their petition of appeal filed as of right based upon their asserted complaint:

(a) That the Court of Appeals of Franklin county, Ohio, in violation of Article IV, Section 1 of the Constitution of the United States failed and refused to give full faith and credit to the public acts and records of the state of Arizona, by reason of which your petitioners were deprived of their property.

(b) A judgment **at law, in ejectment,** for the recovery and possession and the legal title to specific real property was rendered by the Court of Common Pleas in favor of your petitioners against respondents. It was then appealed as a case **in chancery** to the Court of Appeals. The Court of Appeals of Franklin county, Ohio, was without jurisdiction, on the record, to hear, try, and adjudge an action **at law, in ejectment,** on appeal **de novo** as a case **in chancery,** when the Constitution of Ohio provides that the court has jurisdiction on appeal to try de novo, only, cases in chancery.

(c) That the Court of Appeals of Franklin county, Ohio, failed and refused to answer interrogatories propounded by your petitioners, predicated upon its written opinion, as required by the laws of Ohio, so as to make a finding of fact and conclusions of law upon which a valid judgment might be rendered.

(d) That the Court of Appeals of Franklin county, Ohio, refused to permit your petitioners to attack collaterally a void judgment and decree of divorce rendered without jurisdiction by the insolvency court, a court of limited jurisdiction, of Cleveland, Ohio, by reason of which your petitioners were deprived of their property.

The jurisdiction of this court is invoked for the foregoing reasons under the provisions of Section 237(b) of the Judicial Code of the United States, as amended, U. S. C., title 28, section 344(b) (8 F. C. A., title 28, para. 344(b), and rules of practice and procedure.

The jurisdiction of this court on the record, under the petition to grant this writ is established under the following:—

Tumey v. Ohio, 273 U. S., 510, 515;
Matthews v. Huwe, 269 U. S., 262;
Van Huffell v. Harkelrode, 284 U. S., 225, 230;
Titus v. Wallick, 305 U. S., 585, 306 U. S., 282.

STATEMENT OF THE CASE.

The facts are stated at page 2 of the petition.

We wish to here emphasize that with reference to the claim of Mrs. Grace Backenstoe that she was married by license and ceremony at Flagstaff, Arizona, that only three witnesses were offered other than herself, to-wit: Homer Byers (R., page 346), Louis Novarro (R., page

156), and Mary Lewis (R., pages 25 and 109), clerk of the court at Flagstaff. Neither Byers nor Novarro testified as to witnessing any marriage or as to any duly authenticated document, but only as to what Grace or Pat told them or showed them confidentially, or as to what some third party told them. All others relate to confidential declarations of Mrs. Backenstoe and M. P. Murnan and the holding of themselves out as husband and wife after 1919 or as to the occupation and business of Mrs. Backenstoe and her illicit relationship with Mr. Murnan.

Full Faith and Credit.

Article IV, Section 1, of the Constitution of the United States, directs that "full faith and credit shall be given in each state to the public acts and records and judicial proceedings of every other state."

We respectfully submit that the Court of Appeals of Franklin county, and the Supreme Court of Ohio, failed and refused to give full faith and credit to the public acts and records of the state of Arizona, which are involved in this proceeding, to wit:

Section 3836 and 3844 of the Laws of Arizona, in force and effect in 1915, which are set out at page 10 in the petition.

The failure and refusal of the Ohio courts to give such full faith and credit to said laws resulted in the taking of your petitioner' property without due process of law.

It is fundamental, and this Honorable Court has often declared, that when a statute of a state prescribed, defines or limits the things that are essential to create a binding contract made in that state, that it is essential,

that in any court, in any state, wherein the contract required by such statute is sought to be enforced, that the essential requisites of the statute must be found to exist in order to constitute a binding contract. Further the requirements of the statute must be sustained by evidence rather than mere surmise, conjecture, suspicion or experiments of the trial judge. Full faith and credit must be given to such public act and its essential requirements. And if the Federal right thus asserted is intermingled with a finding of fact and conclusion of law as to make it necessary that the court analyze and examine the facts in order to determine whether a Federal right has been denied, that this court has and will take jurisdiction of such a case.

U. S. v. Cargo, 11 Fed. (2), 805, Cert. denied, 273 U. S., 696.

Bradford Electric v. Clapper, 286 U. S., 145, 154-161.

John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S., 178, 181-183.

Aetna Life Ins. Co. v. Duncan, 266 U. S., 389, 393-394.

In the case at bar in order to sustain a valid contract of marriage it must appear that the requirements of the statute of Arizona were complied with. That the statutes of Arizona were never complied with is shown by the testimony of the clerk of the Superior Court of Flagstaff, Arizona, record, pages 25, 109.

In an attempt to justify the evasion and bypassing of the requirements of the Arizona statutes providing for the issuance and recording of a marriage license before any marriage shall be valid in the state of Arizona by the Ohio courts, it is contended that Grace Backenstoe

testified that she was married at Flagstaff, Arizona **(though she never saw or had a license or any marriage paper)**; that one Homer Byers saw at the clerk's office a marriage contract and bond **(none such were ever recognized by the state of Arizona)**; that one Louis Novaro **saw a marriage certificate that looked like his** and had a seal of Arizona on it **(shown him by Grace Backenstoe who testified while alive, that she never had any papers).**

None of this is competent evidence on which to base a finding that the clerk of the court **may have or might have** failed to record the issuance of a marriage license and does not, in the least, comply with the well established rule that:

> "Thus, if a paper purporting to be a certified copy of an official marriage register is offered **it must first** be asked why the original is not produced; this objection being satisfied, **the question then** arises whether the register is receivable under the hearsay exception as testimony to the facts recorded in it, **and, again,** whether under the same exception a certified copy is receivable to show the register's contents; **finally, the genuineness of the certified copy must somehow be indicated.**"
>
> **Greenleaf on Evidence,** 16th Ed., Vol. 1, page 627.

There is no evidence whatever, competent, relevant, or otherwise, of the execution or existence of any original document, or of any authenticated document, or of any autheticated copy of any document, specifically required by the statute of Arizona to constitute a valid and binding contract. The mere statement that someone said he saw something, like something, proves nothing.

Richmond v. Patterson, 3 Oh. 368;
Stanglerin v. State, 170 S., 453;
Niles v. Sprague, 13 Iowa, 202;

Dairn v. Vacuum Oil Co., 113 S. (La.), 751;
In Re Dirinza, 118 N. E., 942 (Mass.);
Gilmore v. Fitzgerald, 260 S., 175;
Blackburn v. Crawford, 3 Wallace (U. S.), 175;
Barnum v. Barnum, 42 Md., 298 (on Arizona law);
Mossman v. Mossman, 4 Ind., 648.

Congress has provided the manner in which under the full faith and credit provision of the constitution "in which such acts, records and proceedings **shall be proved** and the effect thereof."

Williams v. North Carolina, — U. S., —, 87 L. E., 189, 192.

The Court of Common Pleas found that such statute was not complied with, that such contract did not exist. Judgment to that effect was entered in law. The Court of Appeals never made any finding that such statute was complied with in any essential particular, or that such contract existed. **Judge Barnes individually made a conclusion**, but even he made no finding of the essential facts required by statute to make a valid contract.

Not only in the purported finding of fact does Judge Barnes **speculate** as to why the marriage records of Arizona fail to show any marriage license ever to have been issued to Grace Backenstoe or Grace Daugherty and Pat Murnan by saying that **that failure may be accounted for by various possibilities** but **in his own opinion, the other judges each rendering a separate opinion**, he says:

> "Of course the presumption is very strong that the proper officer of the state of Arizona took care of his records in a proper manner, and the fact that **the bound volume contains no record of a marriage license** having been issued to Pat Murnan and Grace Daugherty **argue very strongly that no such license**

was ever issued. Considering the very full and complete testimony of Miss Mary P. Lewis, clerk of courts at Flagstaff, Arizona, as presented in her deposition, we necessarily arrive at either one or the other of the following conclusions:

"First no marriage license was ever issued to Pat Murnan and Grace Daugherty; **or** second the county clerk failed to make a record of the issuance of such a license. **This failure might be wilful or accidental.**" (Emphasis ours.)

Without any evidence to the contrary, there was no other alternative for the court under a controlling "sense of duty," to find that "no such license was ever issued." In order to bypass the express provisions of the law of the state of Arizona and to deny your petitioners the full faith and credit of that public act and of the records of the state of Arizona, **that judge resorts to speculation, surmise and guess as to what might have happened,** as disclosed by his own words. He presumes without any evidence that the essential requirements of the statute were complied with, that both the public officials and the parties violated the statute. What a field for fraud. If this Honorable Court denies a writ of certiorari to your petitioners, **this case will be cited throughout the land,** every time it is required to prove by the records of some state the existence of a paper or contract claimed to have been issued by some public officer in support of the claim that he **may** have, or **might** have, or **could** have failed to properly record the same. Thereby, by speculation and guess make the full faith and credit clause of the constitution of the United States a dead letter. **Therefore this case becomes one of vast, far-reaching public importance. There is not one word of testimony** in this

entire record **that any officer failed to do his duty,** As a matter of fact, the **"very full and complete testimony of M. P. Lewis, clerk of courts of Flagstaff, Arizona," is that the "marriage records of Flagstaff, Arizona are complete."**

Where there is no evidence to the contrary this court has said:

> "* * * and as the presumption always is, in the absence to the contrary, that a public officer while acting in his official capacity is performing his duty, * * *".
>
> **Town of Weyanwega v. Ayling,** 99 U. S., 112, 119.

Therefore when the marriage records are complete and show no license to have been issued or marriage performed, it is presumed in law, the officer did his duty.

In another case this Honorable Court has said:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. This is not enough."
>
> **Chicago M. & St. P. Ry. Co. v. Coogan,** 271 U. S. 472, 478.

Paraphrasing the above: When the evidence, the findings of fact and conclusions, which a court might fairly draw from the evidence, **are taken most strongly against your petitioners,** the contention of respondents that a marriage license was issued and a marriage performed in Flagstaff, Arizona, in July, 1915, is without any substantial support (Judge Barnes guessed as to what **might**

have happened) and leaves the matter in the realm of speculation and conjecture. **This is not enough.**

As a matter of fact, Judge Geiger did not concur in the findings of fact as to the issuance of a license, or a marriage in Flagstaff, Arizona, but finds that a common law marriage existed after 1919, **established merely by cohabitation and reputation,** (his words). Arizona prohibited common law marriages. Judge Barnes in his opinion said that "**the marriage of Pat and Grace must be based on a ceremonial marriage or not at all.**" **The two judges never agreed as to the essential facts,** and we respectfully call the court's attention to the judgment entry which states that "**at the time of the death of M. P. Murnan,** said parties were husband and wife." **That is merely a conclusion** and **clearly not a finding of the material facts essential to a valid statutory marriage contract.** Even Judge Geiger did not and could not find from the evidence that a contract is praesenti, as made essential by the laws of the state of Ohio for a common law marriage, was ever entered into between Grace Backenstoe and M. P. Murnan.

The Supreme Court of the state of Ohio has definitely ruled that in order to establish a common law marriage there must be proof of a contract in praesenti and has said:

> "There is complete failure of proof of an agreement in praesenti to enter into the relationship of husband and wife. The petitioner, therefore, failed to establish a relationship as common law husband of the deceased. So long as common law marriage has any recognition, **the requirements as to proof** must be **rigidly applied and enforced.**" (Emphasis ours.)
> **In Re: Redman,** 135 O. S., 584.

Grace Backenstoe claimed only one marriage and that was at Flagstaff, Arizona. There was no evidence, no proof of any kind of a marriage and no finding of fact by the court of any contract of marriage as provided by the laws of Arizona.

This Honorable Court has held that:

> "A statute is a Public Act within the meaning of Article IV, Section I of the Federal Constitution which declares that full faith and credit must be given in each state to the public acts of every other state."
>
> **John Hancock Mutual Life Ins. Co. v. Yates**, 299 U. S., 178.

When one judge, and one judge only, out of three, (a majority being required), finds that the public acts of the state of Arizona may be, or might have been, complied with, and it is seasonably and specifically asserted that their rights under the Federal Constitution are being and have been denied, by your petitioners in a petition filed as of right in the Supreme Court of Ohio. Your Honorable Court has decided that:

> "(2, 3) The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio is one arising under the Constitution and a statute of the United States, and since the existence of the federal rights turns upon the legal effect of the proceedings in New York and the validity of the judgment there, the rulings on those points by the Ohio court are reviewable here. Adams v. Saenger, 303 U. S., 59, 64, 58 S. Ct., 454, 457, 82 L. Ed., 649. While they involve questions of local laws, and are of a character such that this court ordinarily re-examines them with deference after they have been passed upon by a state court, its determination cannot be accepted here as decisive of the constitutional command is to be observed, especially as the decision

of the state court rests not on the law of its own state or matters peculiarly within its cognizance, but upon the law of another state which is as readily determinable here as in the courts of Ohio."

Titus v. Wallick, 306 U. S., 282, 59 S. Ct., 557, 558, 59 S. R., 561.

And in a more recent case has said:

"Article IV, Section 1 of the Constitution directs that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state' but also provides that 'Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof'.

"This court, of course, is the final arbitrator when the question is raised as to what is a permissible limitation on the full faith and credit clause. Alaska Packers Association v. Industrial Accident Commission, supra (294 U. S., 547, 79 Law Ed., 1052, 55 St. Ct., 518); Milwaukee County v. M. E. White County, supra (296 U. S., 274, 80 Law Ed., 226, 56 S. Ct., 229).

Williams v. North Carolina, .. U. S., .., 87 Law Ed., 189, 192.

Not only is there no evidence, in the record, but the Court of Appeals **as such did not find** from any evidence that a marriage license was ever issued by the clerk of court of Flagstaff, Arizona. **Unless there is such a finding of this and other essential facts, by a competent court, having jurisdiction of the subject matter of the action, sustained by the evidence, the full faith and credit clause of the Constitution of the United States has been evaded in this proceedings and has resulted in the taking of your petitioner's property without due process of law and this Honorable Court should grant a writ of certiorari so as to**

review this case. The action, on the record, is an arbitrary exercise of the powers of government—a denial of the equal application of the laws.

DUE PROCESS OF LAW.

In order that there may be no mistake or misapprehension as to the fundamental constitutional questions raised, asserted, involved and decided in the state courts, we herewith present our summary of the nature of the case.

NATURE OF THE CASE.

This case presented an issue **in ejectment** between your petitioners and Grace Backenstoe and her heirs, the respondents, **raised by the pleadings and heard and determined by the trial court.** This issue is forcefully and distinctly stated by counsel for the respondents herein, in their printed brief filed in the Ohio Supreme Court:

> "The logic of the situation will be much more quickly appreciated if we constantly bear in mind that this was primarily a suit seeking to have the title of the real estate determined and **IF** (but only if) the title is found to be in the plaintiff (and those defendants associated in interest with him), then, and then only to have it partitioned among those found to be entitled to it.
>
> "The problem is essentially the same as if the plaintiff had filed a suit asking for a declaratory judgment, and asking to have himself declared the owner of the property in question, without praying for partition at all."

As against Grace Backenstoe, the petitioners stated a cause of action, **at law, in ejectment,** under the statute, Section 11903, General Code of Ohio, for the recovery of

specific real property, alleging that they, as tenants in common, held the legal title thereto and that she, Grace Backenstoe, was in possession and asked that her possession be declared void.

The law of Ohio provides that Court of Appeals may try de novo cases in chancery only which are entitled "appeals on law and fact"; but Courts of Appeals are strictly limited in law cases to appeals only on questions of law, as in error proceedings. When a case is triable by a jury, in Ohio, it is a law case and subject to appeal on questions of law, as in error proceedings only.

Section 11903 of the General Code of Ohio provides as follows:

> "In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein and is entitled to the possession thereof, describing it with such certainty as to identify the property, and that the defendant unlawfully keeps him out of the possession * * *."

This cause of action as against Grace Backenstoe, was joined with a cause of action for partition among your petitioners herein, as provided by Section 11306 General Code of Ohio.

Section 11306 of the General Code of Ohio provides, among other things, as follows:

> "The plaintiff may unite several causes of action in the same petition whether they are legal or equitable or both when they are included in any of the following classes: * * *
>
> "7. Claims to recover real property with or without damages for withholding it, its rents and profits, and the partition thereof * * *."

The only controversial issue heard and determined by the trial court, at law, was the legal title, ownership and the right of possession to the real estate, the subject matter of this action, an action for the recovery of specific real property.

Therefore this was a case at law and triable to a jury and therefore not appealable on questions of "law and fact" such as would give the court the right to hear it de novo.

Section 11379 of the Ohio General Code provides as follows:

> "Issues of law must be tried by the court, unless referred as hereinafter provided. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, **shall be tried by a jury,** unless a jury trial be waived, or a reference be ordered as hereinafter provided." (Emphasis ours.)

The trial court, a jury having been waived, made a specific finding of fact at the request of the heirs of Grace Backenstoe and entered judgment against the heirs of Grace Backenstoe as to the legal title and possession of the specific real property sought to be recovered, in favor of your petitioners. He found specifically and concluded in law, that Grace Backenstoe was not the surviving spouse of M. P. Murnan and was unlawfully withholding possession of the specific real property described in the petition, from your petitioners.

Article 4, Section 6, of the Ohio Constitution as amended in the year 1912, insofar as it is applicable to the question herein presented, creating, defining and limiting the jurisdiction of the Court of Appeals, is as follows:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and **appellate jurisdiction in the trial of chancery cases,** and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, and **judgments** of the courts of appeals **shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state,** cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the Supreme Court may direct any court of appeals to certify its record to that court * * *." (Emphasis ours.)

Article 4, Section 2, of the Ohio Constitution, as amended in the year 1912, insofar as it is applicable to the Ohio Supreme Court and to the questions herein presented, is as follows:

> "It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and **appellate jurisdiction** in all cases involving questions arising **under the Constitution of the United States or of this state,** in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, * * *" (Emphasis ours.)

Under the pleadings and the state of the record, as herein related, the rights of the parties became fixed. Due process of law, to maintain and protect those rights as guaranteed by the 14th Amendment, has been established in Ohio by Constitution, by statute and by judicial decisions of its highest courts, construing the same. It is the fixed and established law of Ohio by an unbroken line of decisions, which has become what may be called a rule of property, that:

In Raymond v. Railway Company, et al., 57 O. S., 271, 272:

"3. Whether a case is one in equity or at law, does not depend upon the understanding of counsel, or of the trial court, nor upon the form of the judgment rendered, but upon the nature of the action as shown by the pleadings.

"4. A petition against a railroad company by one out of possession of real estate, which alleges title and right of possession of the land in plaintiff, and charges a wrongful entry and possession by defendant, and prays that the defendant may show his interest herein, that it may be adjudged null and void, and that judgment for the possession of the property may be awarded plaintiff, and defendant enjoined from interfering therewith until compensation is made, states a case for the recovery of specific real property, notwithstanding the petition also contained allegations of threatened irreparable damage, as a ground for relief by perpetual injunction, and of a dispute as to boundary lines, as a ground for action by the court in settlement of such dispute, and of a dispute as to title, as a ground for asking that plaintiff's title be quieted. **Such action**, being one in which either party may demand a jury, **is not appealable.**

"5. The nature of such action is not changed by an answer which pleads an estoppel merely as an equitable defense.

"6. Allegations of new matter of an equitable nature in the reply, do not change the nature of the action itself."

The court, in its opinion at page 287 in the above case analyzing the pleadings, says:

"Thus we have a case of a plaintiff out of possession making claim to the title and possession of land, and praying a court to adjudge his title good and award him possession; in other words, praying to re-

> cover the land. **All other relief sought is ancillary to this**; it is relief which, if a proper case is made by the evidence, may follow, but cannot precede, judgment of possession. That is, the case made in the pleading is for possession of land, and then equitable relief to prevent the company interfering with that possession until compensation shall be made. **The real and primary question was one of title. That settled in favor of the plaintiff, all other claims would follow and be determined as matters of relief in aid of the recovery, while, if settled against the plaintiff, his whole contention would fail** * * *."

The pleadings in the case at bar, as determining the issues between petitioners and respondents, are similar to those of **Raymond v. Railway Co.** In both cases the plaintiff was out of possession and claimed the legal title; defendant was in possession and claimed the legal title, the prayer in each case was that the interest and possession of the defendant be declared void.

A case similar with the case at bar was decided by the Circuit Court of Licking county.

Hardway, et al., v. Consumers' Brewing Co., et al., 15 C. C. (N. S.), 349. **Affirmed 87 O. S., 485.**

> "Where the ownership of one of the aliquot parts of land held in severalty is in dispute, an action in partition can not be maintained by the party claiming said interest until his title thereto has been determined."

The court, page 351, supra, in sustaining the motion to dismiss the appeal said:

> "A motion is filed to dismiss the appeal on the ground that, on the issue joined, the case is not appealable.
>
> "By the provision of Section 3226 of the Revised Statutes of Ohio, 'an appeal may be taken to the

Circuit Court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the Common Pleas Court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist.'

"It is further provided by Section 5130 of the Revised Statutes that 'issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury shall be waived or a reference be ordered as hereinafter provided.'

"So that the question presented for determination by this motion is whether or not the issue presented by the petition herein is one in which either of the parties has the right to demand a trial by jury. If the case is held to be one for the recovery of specific real estate, then such right exists. If it is a case for partition, under the statutes of Ohio, then the right to demand a jury does not exist, and the motion should be overruled.

"Upon an examination of the issues tendered by the petition, we think that the right of partition does not exist until it is first determined whether or not the plaintiffs have title to the real estate claimed by them as against the defendant, the Consumers' Brewing Company; that this is the primary object sought in this action; and that the partition is only incidental to the recovery of title by these plaintiffs."

The **Ohio Supreme Court has followed** with approval the rule enunciated **in the case of Raymond v. Railway Company**, supra, in **Wall v. Federation Co.**, 121 O. S., 334, 337.

"Section 11379, General Code, recites in part: Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury unless a jury trial be waived." See **Gunnsaullus, Admr., v. Pettit, Admr.,**

46 Ohio St., 27, 17 N. E., 231; Willson Improvement Co. v. Malone, 78 Ohio St., 232, 85 N. E., 51.

"Whether a suit is one in chancery or an action at law is to be determined from the pleadings and from the nature and character of the relief sought. **Raymond v. T. St. L. & C. Rd. Co.**, 57 Ohio St., 271, 48 N. E., 1093; Maginnis v. Schwab, 24 Ohio St., 336."

This Honorable Court has had occasion to pass upon the difference between an action at law and an action in chancery and has said that:

"So far as general principles go, we certainly should not reverse the decision of the Court of Appeals that the petitioners ought to establish their title at law before partition should be decreed. Wilkin v. Wilkin, 1 John, Ch. 111; Giffard v. Williams, L. R. 5, Ch. 546. 'A bill for partition cannot be made the means of trying a disputed title.' Bolton v. Bolton, L. R. 7 Eq. 298 note, 300; Potter v. Waller, 2 De., G. & S. 410, 417."

Clark v. Roller, 199 U. S., 541.

Jurisdiction of Ohio Court of Appeals.

Therefore, when the Court of Appeals over objection of your petitioners did assume jurisdiction to try this action at law, as a chancery case, de novo, its judgment resulted in denying your petitioners due process of law and the equal protection of laws contrary to the Fourteenth Amendment to the United States Constitution. This question having been presented to the Court of Appeals, and being a question of substance, it became a question arising under both the Ohio Constitution and the Constitution of the United States.

As a matter of fact **counsel for respondents in their**

printed brief in the Supreme Court of Ohio, recognize that the question of jurisdiction was raised at the threshold of the case in the Court of Appeals—and that the Court of Appeals recognized the contention when they stated:

> "While it was pending before the Court of Appeals, the plaintiff (and those defendants who were associated in interest with him) moved to dismiss the appeal on various grounds; but the motions to dismiss were all denied, the Court of Appeals **holding that it had jurisdiction of the appeal**—and **the case was ordered to be heard upon its merits.**"

It may be contended that the motion to dismiss the appeal on law and fact, filed by your petitioners, supra, was not sufficient to question the jurisdiction of the court and save the question.

However, the Supreme Court of Ohio with almost an identical situation presented to it, effectually disposed of that contention in the case of **State ex rel. Farber Rec. v. Jones**, 95 O. S., 357, 363, 2nd Syl.;

> "2. The appealability of a cause can be challenged at any time in the Court of Appeals before the rendition of judgment."

And in the opinion at page 363:

> "It is held in the Prestein Case (93 O. S., 423) that the rule announced in **Drake v. Tucker** did not apply where the motion to dismiss the appeal was interposed before judgment, and for the same **reason it does not apply here. The relator is, therefore, not precluded from challenging the appealability of the order under consideration and in this proceeding the jurisdiction of the Court of Appeals.**
>
> "In his motion to dismiss the appeal filed in the Court of Appeals the relator called attention to the fact that the order from which the appeal was taken

was made on October 15, 1912, and that no appeal bond was filed within thirty days as required by law. He insisted that the Court of Appeals, therefore, was without jurisdiction to hear the cause. **There was no suggestion, however, that the case was not one in chancery and for that** reason could not be appealed. Section 6, Article IV, of the Constitution as amended Sept. 3, 1912. However, this question presents itself and will be considered presently."

Your petitioners, continuing to believe that the Court of Appeals was without jurisdiction, again questioned such jurisdiction and more specifically so and before judgment. The Supreme Court of Ohio has declared that such objection, is in time and requires the court to determine the question.

In **State ex rel. Lander v. Prestlien et al.**, 93 O. S., 423, it was held that:

"2. It is not error for a Court of Appeals to sustain a motion to dismiss an appeal for want of jurisdiction, filed after the cause has been submitted to the court upon its merits."

At page 427 of the opinion the court said:

"The motion to dismiss in this case was interposed before judgment. The mere fact that the cause had been submitted upon its merits did not prevent that court from entertaining that motion, or, for that matter, dismissing the case **sua sponte**, if upon consideration it reached the conclusion that it had no jurisdiction on appeal."

The case of **Ireland v. Chenney**, 129 O. S., 527, involved a petition in error, **filed as of right** under the Ohio Constitution, the Court of Appeals had overruled a motion to dismiss the appeal, because a debatable constitutional

question was involved and in the trial of the cause on its merits held:

> "The sole question presented to this court is whether the Court of Appeals erred in overruling the motion to dismiss the appeal on the ground that the cause was not appealable.
>
> "1. The jurisdiction of the Court of Appeals is fixed by Article IV, Section 6, of the Constitution of Ohio, and cannot be changed by statute. Cincinnati Polyclinic v. Balch, 92 Ohio St., 415, 111 N. E., 159. By the terms of this constitutional provision the jurisdiction of that court on appeal from the court of common pleas is expressly limited to 'trial of chancery cases.' Wagner v. Armstrong, 93 Ohio St., 443, 113 N. E., 397, 398. This rule has been consistently followed in subsequent cases. It is also established in this state that the fundamental basis for determining appealability is found in the issues made by pleadings and the relief prayed for therein. Hummer v. Parsons, 111 Ohio St., 595, 146 N. E., 62; Wall v. Dayton Federation Co., 121 Ohio St., 334, 168 N. E., 847; J. P. Loomis Coal & Supply Co. v. Garchey, 123 Ohio St., 316, 175 N. E., 456. It is therefore necessary to look to the pleadings and if it appears therefrom that the case is one in chancery it is appealable, otherwise not."

The case of **Waters v. Corlett,** 123 O. S., 632, was heard by the Supreme Court of Ohio upon a motion to dismiss a petition filed as of right. The procedure in this case in the Court of Appeals is on all fours with the case at bar. A judgment was rendered in the Common Pleas Court in favor of Mrs. Walters, the case was appealed as a chancery case, the court overruled a motion to dismiss and tried the case de novo and the Supreme Court of Ohio in overruling the motion to dismiss the appeal as of right said:

> "It is a well settled general proposition that it must be determined from the pleadings, and the issues made by the pleadings whether a proceeding is an action in chancery or a suit at law. This proposition has been so often declared that citation of authority is unnecessary.
>
> * * * * * * * * * * *
>
> "The motion to dismiss the petition in error in this case on the ground that no debatable constitutional question was involved must be overruled, because the questions involved in this error proceeding, and the question whether or not the plaintiff in error had a right to file his petition as of right, **do clearly arise under the Constitution.** It must also be held to be a debatable constitutional question because the particular principles involved in this case have never before been determined by this court. The case is properly before the court." (Emphasis ours.)

We respectfully submit that our contention that the Court of Appeals was without jurisdiction is not predicated upon a mere technical violation of petitioners' rights, but goes to their fundamental rights. Under Ohio law an unanimous verdict is required before the Court of Appeals can reverse the lower court upon the weight of the evidence; in the case at bar the Court of Appeals was not only divided; the majority opinion was itself divided. Upon error proceedings, the judgment must have sustained the lower court.

Duty of the Court of Appeals to Make Finding of Fact.

Looking to the question as to whether petitioners received due process of law and the equal protection of the law as well as to whether the refusal of the Ohio Court of Appeals to answer material interrogatories rendered it

impossible for petitioners to obtain a judgment which would give full faith and credit to the public acts and records of the state of Arizona, as required by Article 4, Section 1, of the Constitution of the United States.

Section 12223-30 of the General Code of Ohio provides:

> "On application of a party objecting to a ruling or decision of the Court of Appeals during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether or not error has intervened."

Section 11421-2 of the General Code of Ohio, formerly Section 11470, reads as follows:

> "When questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

Although they read a little different, the purpose of both sections is to permit a reviewing court to ascertain the facts upon which the trial court reached its conclusions of law.

The Ohio Supreme Court has held that:

> "The provisions of Section 11470, General Code, **confer a substantial right and are mandatory**, and where questions of fact are tried by the court without the intervention of a jury, and one of the parties with a view to excepting to the court's decision upon questions of law involved in the trial requests a separate written statement of the conclusions of fact, and as an aid to the court, submits special written interrogatories for such purpose, it is the duty of

> the court to make answer to all interrogatories involving the ultimate facts of the controversy, and to all involving probative facts from which the ultimate facts can be inferred as a matter of law, and its failure to do so is reversible error." (Emphasis ours.)
> **Produce Co. v. Dennert,** 104 O. S., 149.

Likewise, in the case at bar, a complete finding of fact or a complete answer to the interrogatories would have established the essential facts determinative of the controversy. The refusal of the majority of the Court of Appeals to answer the interrogatories or make a complete finding of fact sustains our contention that there is no evidence in the record to sustain the judgment of Barnes, J., and Geiger, C. J., and that **the finding of fact, conclusion of law and judgment of Hornberk, J.,** that:

> "An analysis of the essentials of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law"

is correct.

In the Produce Company case, supra, the court in its opinion says:

> "It is not necessary to set out at length in this opinion the interrogatories, fifteen in number, but it is sufficient to state generally that they entered into such detail that the answers would have disposed of all of the important facts necessary to be determined in reaching a decision of the controversy. No explanation is offered or reason assigned for the trial judge not having answered the interrogatories, thereby furnishing the special findings of fact desired by counsel for the defendant in the trial court. Section 11470, General Code, was designed to serve a useful purpose and without regard to the wisdom of its provisions we are called upon in this case to determine whether its provisions give to parties a

substantial right, or whether on the other hand its provisions may be ignored with impunity."

Produce Co. v. Dennert, 104 O. S., 149, 152.

Neither the judges of the Court of Appeals, nor a master, had any opportunity to see the demeanor of the witnesses on the witness stand, or to pass upon objections to incompetent evidence.

As late as December, 1940, the Ohio Supreme Court has had occasion to follow with approval the Produce Co. case, supra, when it said:

"It is, therefore, our holding that when a timely request is made for conclusions of fact and law in respect for motions for judgment or to direct a verdict by both parties, where no reservation of right to go to the jury thereafter is made, it is the duty of the court to make such conclusions, and the refusal to do so is prejudicial error.

"The third question above propounded may be answered in the language of the opinion at page 155 of 104 Ohio St., at page 532, 135 N. E., of Cleveland Produce Co. v. Dennert, supra, as follows: 'We are of the opinion, however, that Section 11470, General Code (now Section 11421-2 General Code), does confer a substantial right, and that a denial of that right constitutes such error as should cause this court to reverse the judgment, unless it can be determined by this court without weighing the evidence that plaintiff in error has not been prejudiced. Any other view of this section would render its provisions a dead letter'."

Levick v. Vonnell, 137 O. S., 453; 30 N. E. (2), 808, 810-11.

We respectfully submit, therefore, that Section 12223-30 of the General Code of Ohio **is mandatory upon the Court of Appeals** and that its failure and refusal to fully

answer the interrogatories and to make a complete finding of facts so that the record may state the facts upon which the alleged error arises, was a denial of a substantial right and a denial of due process of law and a failure to give full faith and credit to the laws of the state of Arizona.

The Cleveland Divorce.

That your petitioners have been denied the equal protection of the law and due process of law is apparent by an examination of the most recent case in Ohio upholding the doctrine, long established, that one affected by a void judgment can attack it whenever and wherever it is met which was decided by the Court of Appeals of Meigs county, Ohio, and is the law of the state of Ohio, by its highest court.

In that case one Mrs. Frankenberg filed a suit against herself, as executor of her husband's estate, in the Probate Court, alleging that she was his surviving spouse notwithstanding that the evidence showed that Mr. Frankenberg had secured a divorce from her in Franklin county, Ohio. The record in that divorce case is similar to the case at bar, i. e. no affidavit for service by publication was filed at the time the action for divorce was begun. The Court of Appeals reversed the lower court and held that the decree for divorce was void, that she was never divorced and said:

> "**This action is a collateral attack upon a divorce proceeding** instituted by the decedent, Charles Frankenberg, on September 4, 1908, in the Common Pleas Court of Franklin county, Ohio. The record discloses that executor and decedent were married in 1899; that they separated in 1908, and that dece-

dent brought action for divorce on the ground of willful absence in 1908 as above mentioned. The record further discloses that no preliminary affidavit for constructive service was filed but notwithstanding publication of notice was started September 9, 1908, and continued for six weeks.

* * * * * * * * * *

"It affirmatively appearing from the record here that no preliminary affidavit was ever filed the attempted service by publication was not authorized and the court never acquired jurisdiction of the person of the defendant in this divorce case and publication without such affidavit, is wholly void. Judge Bradbury in the Winemiller case made the following comment on page 420:

" 'Of course, a judgment that is void may be disregarded whenever and wherever it may be met.'

"The Supreme Court in the case of Paulin v. Sparrow, 91 O. S., 279, discussing a similar question, said on page 287:

" 'Where it affirmatively appears from the records of a court of general jurisdiction that the defendant has not been legally served with process, a decree purporting to determine the rights of such defendant is void.'

"The record in this case shows affirmatively that publication was made without a preliminary affidavit as required by law. A most casual reading of the record impeaches the judgment entry of the court. This judgment granting the divorce was void for lack of jurisdiction of the person of the defendant and being void the decedent died leaving the defendant in that case, the executor here, his surviving spouse."

Frankenberg v. Frankenberg, 70 Ohio Appellate, 495, Meigs county Court of Appeals. Motion to certify overruled, Nov. 5, 1942.

Granting due process of the law and the equal protection of the law and applying the above decision to the

Cleveland divorce of Grace Backenstoe from George Backenstoe, which was procured by the service of summons by publication without the filing of the preliminary affidavit required by law, Grace Backenstoe, at the time of the death of M. P. Murnan, was still the wife of George Backenstoe and therefore could not have married M. P. Murnan during his lifetime and was not his surviving spouse.

Another Ohio court, whose decisions are final in the state of Ohio, has held:

> "1. Statute providing method of service against non-resident defendant in divorce action is mandatory and must be strictly complied with (Section 11524, General Code).
>
> "2. Trial court held without jurisdiction of non-resident defendant in divorce action, where affidavit for constructive service was sworn to before notary public who was attorney of record for plaintiff (Sections 11524, 11529, 11532 and 11984, General Code)."
>
> **Beck v. Beck**, 45 Ohio Appellate, 507.

In paragraph 10 of the judgment entry (R., page 278), the Court of Appeals found that "service was had against the defendant, George Backenstoe, by publication, an affidavit of publication now in the files having been executed by her attorney as notary."

It follows from the law enunciated in the **Beck** and **Frankenberg cases cited**, supra, that the decree of divorce was not merely voidable but void ab initio and the refusal of the Court of Appeals to permit collateral attack was a complete denial of the judicial process to which your petitioners were entitled. If Grace Backenstoe was never able to marry M. P. Murnan because of her pre-existing marriage, this fact would have disposed of the entire case.

RIGHT OF DUE PROCESS.

Due process of law and the equal protection of the laws are guaranteed the individual in every state by the 14th Amendment to the United States Constitution.

This means in the first instance, that these words were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Bank of Columbia v. Okley, 4 Wheaton, 235;
Hurtado v. Cal., 110 U. S., 516, 527;
Leeper v. Texas, 139 U. S., 462, 468.

It means also that no room is left where it affects the fundamental rights of an individual for the play of purely personal or arbitrary power; it means that equal protection shall be given to all under like circumstances, in the enjoyment of their civil and political rights; that all persons shall have like access to the courts for the protection of their persons and property, wrongs and contracts, and it means that no impediment or denial in a court of justice, shall be interposed to one except as it may apply to every other individual under like circumstances.

Yick Wo v. Hopkins, 118 U. S., 356, 369, 370;
Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 558, 559.

The guarantees of this Amendment, and the prohibitions therein contained to make effective those guarantees, extends to the judiciary as well as to the legislative.

They require that in every judicial proceeding, that no

one can be deprived of his life or property or liberty without jurisdiction in the court of the subject matter and the person, and with notice and a hearing. They further require, that even though the court does have jurisdiction of the subject matter and the person, yet the court cannot transcend the power conferred by law.

Scott v. McNeal, 154 O. S., 34, 40;
Harris v. Hardiman, 14 How. (U. S.), 334, 341.

Walker v. Sauvinet, 92 U. S., 92, 93:

"Due process of law is met if the trial is had according to the settled course of judicial proceedings. Murray v. Hoboken, etc., 18 How. 280. * * * This process in the state is regulated by the law of state."

Del Castillo v. McConnico, 168 U. S., 674:

P. 693. "Due process of law must be found in the state statute and cannot be departed from without violating the Constitution of the United States. (This case referred to taxes and statute providing for same.)"

"To determine the existence of due process is the final province of this court."

Den. Murray v. Hoboken Land Co., 18 How., 272, 280:

P. 280. "Due process of law generally implies and includes act or reus, judex, regular allegations, opportunity to answer and **a trial according to some settled course of proceedings** (several cases cited)." 2 Inst., 47, 50, 4 Dev. N. C., 15; 4 Hill 146. (This is not true, if it relates to a matter which is not of judicial cognizance.)

The jurisdiction of every court to render judgment and render the judgment it did render when it affects the right of property and has been challenged may be exam-

ined in every other court where it is sought to rely upon that judgment. If the judgment is rendered without jurisdiction of the subject matter, or person, the judgment is void and can always be assailed.

Scott v. McNeal, 154 U. S., 34, 40;
Rose v. Himely, 4 Cranch., 241, 266, 267;
Elliott v. Piersol, 1 Peters, 328;
Rhode Island v. Mass., 12 Peters, 657, 715;
Williamson v. Berry, 8 How. (U. S.), 495, 540, 541.

The judiciary is amenable to the guarantees of the 14th Amendment. A trial must be had according to the established mode of procedure applicable, to the class of cases to which the case under consideration belongs, and to the determination of the issues. The mere fact that the parties were brought before the court and were heard or given an opportunity to be heard, does not in and of itself establish due process.

If the court does disregard established principles of private right and distributive justice, if it ignores as against an individual established modes of procedure governing the case and issues in question, if it discriminates in its administration and application of the law governing the procedure and rights of the parties, by virtue of which the party has been deprived of his property and without compensation, then due process of law and the equal protection of the laws has been denied.

U. S. v. Cruikshank, 92 U. S., 542, 554;
Chicago, etc., v. Chicago, 116 U. S. 226, 234-237.

"Though a court possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. All courts are more or less limited in their jurisdiction, even the highest. They are limited to particular classes of action,

civil or criminal; or to particular modes of administering relief such as legal or equitable. It must act judicially in all things and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction of the subject and of the parties, has no power to pass judgment of imprisonment in the penitentiary, upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case specific performance of a contract. If the action be for possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

"If the judgment of a court having jurisdiction exceeds the issue heard, it is in effect depriving defendant of benefit of his constitutional right to notice and is invalid and void."

Windsor v. McVeigh, 93 U. S., 274, 282, 283;
Reynolds v. Stockton, 140 U. S., 254, 265, 268;
Barnes v. Ry. Co., 122 U. S., 114.

It is the contention of the petitioners that the action of the Supreme Court of Ohio and of the Court of Appeals on the record, is so arbitrary and discriminatory under the Constitution, law and facts, and without any support in the evidence as to operate as a denial of due process of law and of the equal protection of the laws.

Nowhere in Ohio can it be shown, under a similar state of the record, when the Court of Appeals or the Supreme Court ever assumed to try a case in chancery de novo, an action which admittedly and concededly on the record is an action at law, and never was a chancery case, over

the timely objection of the parties to such want of jurisdiction. It results in arbitrarily taking the property of petitioners and without compensation, and in doing so by denying to him the protection, under the Constitution and established applicable law, accorded to others similarly situated and in like circumstances.

No court and no individual, or party has assumed to decide or maintain herein, that this is not an action at law as between petitioners and respondent heirs and devisees of Grace Backenstoe, and therefor triable only on error. No court in Ohio has ever assumed to decide or declare and no one has sought to maintain that this case on the record was and is a case in chancery, triable de novo in the Court of Appeals.

No decision was rendered herein, attempting to change or modify the fixed and established law in Ohio under the Constitution, applicable to the record and controlling the rights of the parties, which has in effect become a rule of property, that the Court of Appeals had jurisdiction only to try on appeal, de novo, those cases which are and were only chancery cases.

The courts of Ohio arbitrarily refused to meet that question, arbitrarily proceeded to hear and determine the cause as a case in chancery and in doing so refused to make any finding of the essential facts, essential to any judgment on the record.

Petitioners contend this arbitrary action, this unequal treatment under the law, is a violation of the 14th Amendment to the United States Constitution.

The right of appeal and more especially the right of appeal to try a case de novo, in chancery, is not a common law right. It is now and has always been a statutory,

or constitutional right. Therefore, in that sense, as with the United States courts, which acquire their jurisdiction by and through the Constitution, solely, Courts of Appeals in Ohio are courts of limited and special jurisdiction—they do not have general jurisdiction on appeal.

Therefore, since such grant of jurisdiction is not after the course of common law, there is no presumption in favor of jurisdiction. The specific requirements of the statute or Constitution as to jurisdiction must appear affirmatively in the record. This proposition has been definitely established in the jurisprudence of both Ohio and the United States.

See:

Galpin v. Page, 18 Wall (U. S.), 350, 370-373;
Old Wayne Mut. L. Assurance Co. v. McDonough, 204 U. S., 8, 15, 17.

"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford county; that its proceedings were conclusive upon the matter, whether erroneous or not.

"We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned; when its proceedings were brought before it collaterally, before the circuit court. We know of nothing in the organization of the circuit courts of the Union which can contradistinguish."

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. **But, if it act without authority,** its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in

opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

"The distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising any authority over a subject, may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Elliott v. Piersol, 1 Peters, 328, 340. This case was followed in 12 Oh., 253, 269, Adams v. Jeffries.

Lessee of Hiceky v. stewart, 3 How. (U. S.), 750, 762.

In the case of Rose v. Himely (4 Cranch., 241, p. 269), Chief Justice Marshall said:

"A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. **The power of a court then is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide whether its sentence has changed the right of property.**

"**The power under which it acts must be looked into,** and its authority to decide questions which it professes to decide, must be considered." * * * Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined.

(P. 269, 4 Cranch.) "In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court.

P. 762. "The same doctrine was maintained in Wilcox v. Jackson, (13 Peters 511)."

Galpin v. Page, 18 Wall., 350, p. 371:

"However high the authority to whom a special statutory power is delegated," says Mr. Justice Cooleridge of the Queens Bench, "we must take care that in the exercise of it the facts giving jurisdiction plainly appear, that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor, as to any order of Petty Sessions. * * *

"A court of general jurisdiction may have special and summary powers, wholly derived from statute, not exercised according to the course of common law, which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases both as to the subject matter of the judgment and as to the persons to be affected by it must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse v. Presly, 5 Fost, 302.

"The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. * * * Where general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

"The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred.

"Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects, or other persons a more extended and general jurisdiction. (To the same effect as Adams v. Jeffries, 12 Oh. 272.)

"Here, the court said, where jurisdiction is to be acquired by publication by following the statute, if the state court did not follow it, it could not be expected that the United States Supreme Court would not follow it in any case presented to it."

Yick Wo v. Hopkins, 118 U. S., 369, 370, said in addition to what it quoted above:

"Law is definition and limitation of power.

"The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the language of the Massachusetts bill of right, the government of the commonwealth 'may be a government of laws and not of men'.

"For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Truax v. Corrigan, 257 U. S., 254 involved a statute of Arizona. On page 332, the court said:

"This brings us to consider the effect in this case of that provision of the 14th Amendment which forbids any state to deny any person the equal protection of the laws. The clause is associated in the amendment with the due process clause, and it is customary to consider them together.

* * * "The due process clause says the court cannot proceed arbitrarily or capriciously. * * *"

"Our whole system of law is predicated on the general fundamental principle of equality in the application of the law."

P. 333. "Protection is not protection unless it does protect."

"When the record discloses a want of jurisdiction, the judgment is, of course, void everywhere and for every purpose * * *."

"Every judgment depends for its force and validity, on the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction, over the subject matter or the person, even though absolutely conclusive in other particulars."

Spier v. Corll, 33 O. S., 236, 244;
Pennywit v. Foote, 27 O. S., 600, 615, 618;
Kingsborough v. Tousley, 56 O. S., 450, 455-460;

These cases follow Thomas v. Whiteman, 18 Wall, 457, Pennoyer v. Neff, 95 O. S., 714.

On the other hand, the Constitution of Ohio, Section 6, Article IV, provides that the Court of Appeals shall have appellate jurisdiction **only in chancery cases. If the case at bar is not a chancery case** and is an action at law for the recovery of specific real property, any judgment on the record entered by the Court of Appeals is without jurisdiction, void and of no effect.

We, therefore, respectfully submit that this case being an action at law for the recovery of specific real property, the Court of Appeals was without jurisdiction to try or determine this; that to do so on the record was an arbitrary exercise of the powers of government and a denial of the equal application of the laws; that full faith and credit was arbitrarily denied petitioners.

CONCLUSION.

Summarizing, it is our contention that:

(1) All the elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is indisputably involved the question of the manifest denial by the courts of Ohio of the guarantee of full faith and credit to the public acts and records of the state of Arizona on an essential matter controlling the rights of the parties on the record.

(3) There is involved the question of the petitioners being deprived of their property, without compensation, and without due process of law and the equal application of the laws as measured by the Fourteenth Amendment.

The judgment of the Supreme Court of the state of Ohio and of the Court of Appeals should be reversed and judgment entered for the petitioners.

Respectfully submitted,

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(4)

OCT 5 1943
CHARLES ELMORE CROPLEY
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No. 1094. 103

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

RALPH REA, ET AL.,
Petitioners,

vs.

WILLIAM B. DEVANNEY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

RALPH REA, ET AL.,
Petitioners,

vs.

WILLIAM B. DEVANNEY, ET AL.,
Respondents.

No. 1094.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

We earnestly contend that petitioners' petition should be dismissed at this time, and an end put to the five years' litigation begun by a grandnephew of M. P. Murnan, seeking to partition the real estate of M. P. Murnan and quiet the title against the widow, who had been the wife of M. P. Murnan for twenty-two years prior to his death.

There is no federal question of substance in this case, only a plausible appearance premised upon a most distorted statement of evidence, pleadings and procedure.

A **true** perspective of the case may be obtained from the three opinions of the Court of Appeals, reported consecutively in the **46 Northeastern, 2nd Series,** beginning respectively at pages 649, 664 and 667. For the convenience of the court, and as a reading thereof will, we believe, convince the court of the total lack of merit of the petitioners claims, we print herewith the opinion upon the merits as Appendix I, the opinion overruling the motion for a new trial and incorporating findings of fact and conclusions of law as Appendix II, and the opinion overruling the motion to vacate the judgment upon the ground of lack of jurisdiction as Appendix III.

"SUMMARY STATEMENT."

Under this heading what they label as a brief statement of undisputed facts is a most distorted statement. For a fair review of the evidence we refer to the Court of Appeals opinion, Appendix I, page 40 to 76, infra.

On November 7, 1912, the then Mrs. Grace Backenstoe obtained a decree of divorce from her long-absent first husband, George Backenstoe, in the Court of Insolvency of Cuyahoga county, a court of record having concurrent jurisdiction with the Common Pleas Court in divorce and alimony cases (**Addams, Judge, v. State,** 104 O. S., 475). In the decree the court determined that it had jurisdiction of the subject matter and of the defendant by service by publication. The decree was never questioned by the defendant, directly or indirectly. During the taking of the testimony in the Court of Appeals these petitioners pre-

sented a transcript of papers now in the files of said case, including an affidavit for service by publication sworn to before a notary of the same name as the attorney of record. No identification was attempted. This Honorable Court refused a writ in a case involving the identical question, the Court of Appeals of Cuyahoga county having held that the irregularity made the judgment voidable and subject only to direct attack by the defendant **(Hudson, Adm., v. Owens**, 28 Ohio Law Reporter, 221; 280 United States, 571).

M. P. Murnan became interested in Grace Backenstoe in 1914 or 1915, but the obstacle to their marriage in Columbus was the fear of the affect on his taxicab business of public association of his name with her sporting house. In July, 1915, he arranged an automobile trip, ostensibly for the purpose of visiting the San Francisco World's Fair, including in the party Grace Backenstoe, Homer Byers and Tommy Stevens. On the return trip, to avoid a crossing of the Great American Desert between Barstow, California, and Flagstaff, Arizona, for Grace, who had been sick, Murnan and Mrs. Backenstoe went by train from Barstow to Flagstaff. Murnan took advantage of their arrival ahead of the car to secure a license, and they were married by the justice of the peace at Flagstaff.

Upon the arrival of the car, Byers, being informed by the garage keeper, took Tommy Stevens and went to the court house to verify the report, not daring to question Murnan, and was shown the original marriage license and certificate in a basket on the clerk's desk. His recollection after twenty-five years was of those things which would likely impress one under his circumstances. He remembered the state seal of Arizona and the signature of the clerk upon the upper part of the document; he identified the signatures

of the "contracting parties" upon the lower part of the document, although surprised at the name of "Grace Daugherty," the maiden name to which Mrs. Backenstoe had been restored by the divorce decree.

The clerk failed to copy the license and the certificate into the permanent record, but the looseness of the practice in this regard was developed in the deposition taken by us of the present clerk, Mary P. Lewis (Vol. IV, page Z-44). This looseness is commented upon by the Court of Appeals in its opinion, Appendix I, and in its fourteenth finding of fact, Appendix II. The difficulty of proof after twenty-five years is evidenced by the death of the justice of the peace, the disappearance of the then clerk of court, and the deaths of all members of the automobile party except Homer Byers. It was the practice for the clerk to return the license and certificate to the parties after he had had an opportunity of copying them in the record, and during the following fall it was shown by Mr. and Mrs. Murnan to Louis Novario, Cleveland politician and their mutual friend, after Mrs. Murnan's suggestion that "we can trust Louis."

Thereafter, to business associates and friends, Murnan boasted that he had married the richest woman in Columbus, and that he need now have no fear of gambling losses. They told their close friends of their marriage with the warning against publication because of the fear of the affect of publicity on Murnan's taxicab business. Mrs. Murnan gave him large sums of money, whenever he asked for it, and when she sold her South Front Street house to the F. & R. Lazarus department stores for $52,000.00, she took out a building permit and used the entire $52,000.00 in building a large investment building on Murnan's North High Street lots, one of the most valuable properties in his present estate.

Without taking further time to outline the vast amount of testimony in relation to their conduct as husband and wife, constituting almost three volumes of testimony, which is undisputed except for deeds given during the first few years while Mrs. Murnan owned the questionable house, we refer to the brief summary of this evidence in the Court of Appeals' fifteenth finding of fact, Appendix II, as follows

> "The fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of the said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large showplace on North High Street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interests in each other's property and **by all of their conduct until the death of Maurice P. Murnan on May 12, 1937.**"

"STATEMENT OF CASE."

Under this heading counsel seek to establish the **false premise** that the case was tried as an action at law in ejectment. Their repeated statements to this effect, and concessions attributed to these respondents and to the trial courts are absolute misrepresentations, as we will prove conclusively later in this brief.

The petition was carefully drawn to seek equitable remedies only, namely, partition, the quieting of title and equitable accounting. It denied that there was any adequate

remedy at law, and carefully avoided any allegation of wrongful possession, the essential element of an action in ejectment. The answers, filed by Mrs. Murnan and two nieces of Mrs. Murnan, took issue only with the claim of this grandnephew that he was an heir of M. P. Murnan, alleging that Grace Murnan was the surviving spouse and **sole** heir and asking that the petition be dismissed.

Upon the second trial in the Common Pleas Court, after the death of Mrs. Murnan, the trial judge sitting upon the chancery bench, found in favor of the petitioners upon the marriage question. In his opinion overruling the motions for a new trial, and making findings of fact and law (Transcript, page 75, et seq.), he pointed out that the remedies sought were partition, the quieting of title and equitable accounting, and in his conclusions of law found the petitioners entitled "to a decree quieting the title," etc., "to a decree in partition," etc., and "to a decree in accounting for the rents and profits," etc., and to these remedies only. Judgment was entered accordingly on August 22, 1940, with a finding in the accounting against Raymond W. Kilbourne, as executor under Mrs. Murnan's will.

Separate appeals were filed by Mrs. Murnan's heirs, including Margaret Lunn, niece of M. P. Murnan. Motions were made by these petitioners to dismiss the appeals on the sole ground that adequate bonds had not been given, and the motions were overruled by unanimous decision of the Court of Appeals on February 25, 1941. (Transcript, page 100, et seq.). By entry of April 22, 1941 (Transcript, page 108), it was stipulated that testimony be taken as upon deposition, and that either side could offer the testimony of witnesses, who had testified in the Common Pleas Court. Almost all of this latter testimony was offered and constituted Vol. I of the record. Vols. II and III

consist of new testimony introduced by the respondents, and Vol. IV consists of exhibits of both sides and two witnesses offered by the petitioners.

The decision of the Court of Appeals was filed March 12, 1942, and is attached hereto as Appendix I.

The majority opinion, written by Judge Barnes, contains an able and conscientious discussion of every question presented; and finds (1) that the burden of proof was upon this distant relative to prove that there was no surviving spouse; (2) that the Backenstoe divorce decree was not subject to collateral attack because of alleged irregularity, being voidable only upon direct attack by the defendant therein, following **Hudson, Adm., v. Owens**, an unanimous opinion by the Court of Appeals of Cuyahoga county on the identical question (28th Ohio Law Reporter, 221), in which case this Honorable Court denied the petition for a writ (280 United States, 571), after the Ohio Supreme Court had denied a motion to certify (28 Ohio Law Reporter, 475); (3) that Grace Daugherty (Backenstoe) had been ceremonially married to M. P. Murnan at Flagstaff, Arizona, about July 15, 1915; (4) that under the laws of Arizona the alleged irregularities did not render the marriage invalid; (5) that, if such had been the case, the intention of the parties, expressed at such ceremony, would be imputed to the subsequent cohabitation to constitute an Ohio common law marriage under the decision of the Supreme Court of Ohio in **Johnson v. Wolford**, 117 O. S., 136.

Judge Gieger concurred in all of these conclusions, and went a step farther, namely, that the evidence was sufficient to support a conclusion of common law marriage under the laws of Ohio, even if there had been no ceremonial marriage, and concluded his concurring opinion, as follows (Appendix I, page 71):

> "I am of the opinion that the evidence produced might well establish either a ceremonial or a common law marriage and, therefore, I concur in the opinion so holding.
>
> "I likewise concur on all other questions."

Judge Hornbeck concurred in sustaining the divorce, but dissented on the question of marriage. After stating that the rule as to burden of proof did not affect his conclusion, he inconsistently concluded his opinion as follows (Appendix I):

> **"The record may not be read without the impression that Pat and Grace were married,** but an analysis of the essentials of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law."

On March 15, 1942, petitioners filed their motion for a new trial and for findings of fact and conclusions of law. Under the requirements of Rule 9 of the Court of Appeals, they prepared their desired findings of facts, which were duly submitted with our objections. The Court of Appeals found these so inconsistent with its decision that it adopted others, eighteen in number, in a per curiam decision filed on April 7 (Appendix II, infra). These findings fully satisfied the petitioners' right under the statutes and laws of Ohio to findings of "the ultimate facts of the controversy, and all probative facts, from which ultimate facts can be inferred **as a matter of law.**" (39 Ohio Jur., 1204.)

The petitioners did not stand on their first request, but thereafter until June 2 bombarded the court with Professor Quiz lists of questions on irrelevant or probative facts not necessary to the court's conclusions on the ultimate facts. The court's patience, however, seemed unlimited and they invited counsel to submit their suggestions incorporated

in a judgment entry form. The court then adopted with some modifications the form submitted by the petitioners, including therein unnecessary findings reflecting upon the prior conduct and business of the Murnans. In this entry the petitioners attempted to jockey Judge Gieger into the position of finding common law marriage only, instead of his actual finding that the evidence was sufficient to prove either form of marriage, as stated in his original opinion and in the per curiam finding of facts of April 7 (Appendix II). To their words "this establishes a common law marriage between the parties" (finding eighteen), the court added the words "but might well corroborate a ceremonial marriage."

The judgment entry was filed June 6, 1942, and on June 30 the petitioners filed a motion to vacate the judgment, in which they for the first time made the claim that the allegations of their petition as to Mrs. Murnan constituted a cause of action in ejectment, and not an action to quiet title.

This motion was overruled in the opinion written by Judge Hornbeck filed July 27, which we attach as Appendix III. Therein is pointed out petitioners' misconception of the jurisdiction of the Court of Appeals as to subject matter, and that the claim of an action in ejectment was then made for the first time.

Upon these facts the Supreme Court of Ohio dismissed on December 16, 1942, the petitioners' appeal as of right for the reason that "no debatable constitutional question is involved." (Rea, Appellant, v. Fornan, et al., 140 O. S., 546). After repeated applications for a rehearing, the case was reheard but the court adhered to its original conclusion (141 O. S., 476).

THE PETITIONERS' QUESTIONS.

Instead of following through the maize of petitioners' brief and its reiterations, we will treat separately the four questions, which seem to be the sum of their contentions: (1) Were petitioners denied due process by the trial de novo of the case by the Court of Appeals? (2) Did the Court of Appeals fail to give full faith and credit to the laws and records of Arizona by its finding of marriage? (3) Did it deny petitioners due process by failing to make certain findings of fact and law? and (4) were petitioners denied due process by the denial of a collateral attack upon the divorce decree of November, 1912?

THE PETITIONERS WERE NOT DENIED DUE PROCESS BY THE TRIAL DE NOVO OF THIS CASE BY THE COURT OF APPEALS—NATURE OF ACTION, AND JURISDICTION OF COURT OF APPEALS.

The petitioners repeatedly assert in their petition and brief that this case was heard as an action at law in ejectment in the Court of Common Pleas and the Court of Appeals, and was so considered and treated by judges and counsel; and that consequently the Court of Appeals had no jurisdiction of the **subject matter** to hear the case de novo, the judgment accordingly being void and the petitioners denied "due process."

Even if this were an action at law, in Ohio it is well settled that the Court of Appeals has jurisdiction under the Ohio Constitution of 1912 of the subject matter of **every** case decided in the Common Pleas Courts, and that the question of the mode of trial is **not** one of jurisdiction of

the **subject matter making the judgment void.** The Ohio rule is well stated in the opinion of the Court of Appeals overruling a motion to vacate the judgment (Appendix III), as follows:

> "**Jurisdiction** is the power of a court to hear and determine a cause generally. **This court by the Ohio Constitution, is given capacity to entertain appeals on questions of law and fact,** general jurisdiction to determine the subject matter of such appeals and to pass upon and determine its own jurisdiction. The test of jurisdiction is the court's power to act at all, not the correctness of its decision in so acting.
>
> "We recognize that jurisdiction of the court of the subject matter may be raised at any time, even after judgment, but the test of jurisdiction of the subject matter is not so limited as contended by the appellees. Improvement Company v. Malone, 78 O. S., 238. The question is no longer an open one in Ohio, but has been decided adversely to the claims of appellees both before and since the Constitution of 1912. 2 Ohio Jur., 562-4; Drake v. Tucker, 83 O. S., 97; Cadwell v. Cadwell, 93 O. S., 23; The Trumbull Savings and Loan Company v. Saviers, et al., 115 O. S., 403; Union Trust Company v. Lessovitz, 122 O. S., 406; Habecker v. Houck, 16 Ohio Abs., 58."

Petitioners repeated assertions that this case was tried as an action at law in ejectment are directly contrary to the facts, as is shown by the following specifications:

(1) **Their** petition was carefully drawn to state equitable causes of action only, i. e., for **partition, the quieting of title,** and incidental **equitable accounting. It specifically disclaims any adequate remedy at law. They were careful not to claim that Mrs. Murnan was wrongfully in possession, or even that she wrongfully collected the rents and profits, but only that she refused to account after their collection, thus omitting the primary characteristic of an action of ejectment at law.**

For the convenience of the court we quote all of the allegations of the petition with relation to Mrs. Murnan, or Grace Backenstoe as there named. This petition, which is entitled "Petition in Partition," first recites that plaintiff, as a grandson of a half-brother of M. P. Murnan, inherited and is seized, as tenant in common, of a one-ninetieth part of his real estate; that other named grandnephews, et al., are Murnan's only heirs and next of kin; that the personal property is sufficient to pay the debts, and that plaintiff desires to have his interest in said premises set off to him in severalty, and then proceeds:

> "That since May 12, 1937, the defendant, Grace D. Backenstoe, who claims an interest in said premises, has been in possession thereof, collecting therefrom its rents and profits, has failed, neglected and refused to pay over, or in any manner account therefor and has threatened to and will continue to do so, to the irreparable injury of this plaintiff, **for which he is without an adequate remedy at law.**
>
> "Wherefore, plaintiff prays that he may have **partition** of the premises hereinbefore described, according to law; that the defendant, Grace D. Backenstoe **be required to set up** what interest, if any, she may have, in said premises and that **the same be declared null and void**; that this plaintiff may have **an accounting** of rents and profits issuing from said premises; that **a trustee ad litem be appointed** for the preservation of said premises and the rents and profits issuing therefrom; and that he may have such further relief in law and in equity as the court may deem just and proper in the premises."

(2) The petitioner's selection of equitable remedies, partition and the quieting of title, recognized by the well settled law of Ohio as chancery actions and appealable, was not questioned by the answers of Grace Murnan and the joint answers of Mary Fallon and Margaret Lunn, **nieces**

of M. P. Murnan and named by the plaintiff as joint tenants with him, each answer merely setting forth that Grace Murnan was the widow and **sole heir** of M. P. Murnan and asking that the petition be dismissed. As the Court of Appeals pointed out, the effect of such an answer "was to challenge the allegations of the petition that the plaintiff and the groups referred to in his petition were the heirs of Pat Murnan."

After Mrs. Murnan's death, when the action was revised by making her heirs party, the same two nieces of M. P. Murnan, as well as other heirs of Mrs. Murnan, filed answers, alleged again that Grace Murnan had been the widow and sole heir of M. P. Murnan and that they had an interest in the property under the terms of her will; denied generally the allegations of this petition and asked that it be dismissed.

Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition.

(3) There was no demand for a jury trial in the Common Pleas Court; and there was no thought of one. The case, so clearly defined in equity by the petition, was sent by the assignment commissioner to the chancery room for trial and not to one of the civil jury rooms.

(4) Judge Turner, the common pleas judge who decided the case in favor of the plaintiff, specifically pointed out in his written opinion on the motion for new trial and the motion for findings of fact and law that this was an action for partition, for the quieting of title and an accounting, as follows (Opinion, page 1, Transcript, page 75):

> "Counsel for plaintiff has submitted two suggested findings of fact, in effect joining in the request for findings. Apparently, the request for a finding of facts

and conclusions of law was made without due regar
**to the issues in this case, which seek partition of sa
lands, the quieting of title thereto and an accountin
for rents and profits."**

In his conclusions of law at the end of the same opinio
Judge Turner, after finding that the title was in petitioner
allows the following remedies only:

"4. Plaintiff is entitled to a decree **quieting the tit**
to the real estate described in his petition in plainti
and the other next of kin of Maurice Patrick Murna
referred to in conclusion one last above.

"5. Plaintiff is entitled to a **decree in partition** of t
seventeen parcels of real estate in his petition describe

"6. The tenants in common referred to in conclusio
one last above, are entitled to a **decree in accountin**
for the rents and profits of the real estate described
plaintiff's petition, as follows:" * * *

**These same three remedies, and these only, appear in t
judgment entry as follows** (Transcript, page 88):

"4. The court further finds that Grace D. Murnan,
Grace D. Backenstoe, was not the widow of the sa
Maurice Patrick Murnan," * * *

"It is therefore ordered by the court that the clain
of the said Grace D. Murnan, sometimes also calle
Grace D. Backenstoe, Raymond W. Kilbourne, as h
executor, and the various heirs at law, and devisees
the said Grace D. Murnan, sometimes also called Gra
D. Backenstoe, to the real estate of the said Mauri
Patrick Murnan, the real estate described in the pe
tion herein, as set forth in their various pleadings, b
and the same hereby are denied and dismissed and t
title of the plaintiff and the defendants mentioned
paragraph 2 hereof, **is hereby quieted against the d
fendant, Grace D. Murnan**, also known as Grace Bac
enstoe, the heirs and devisees of the said Grace
Murnan and each and every one of them, and all pe
sons claiming under them, or any of them; and they a
hereby forever enjoined from setting up any claim
said premises or any part thereof, adverse to the tit

and possession of the said plaintiff and defendants, their heirs or assigns, thereto." * * *

"6. The court further finds that plaintiff, and defendants hereinafter named, are tenants in common in the real property described in the petition; that plaintiff, Ralph Rea, has a legal right to, and is seized in fee simple in an undivided 1/90th interest"; * * *

"7. It is therefore ordered, adjudged and decreed that **partition of said estate** be made in favor of plaintiff and defendants, in the proportion set forth in the preceding paragraph," * * *

"And it is ordered that **a writ of partition issue** to the sheriff of Franklin county, Ohio," * * *

There was no finding that Mrs. Murnan was wrongfully in possession of the property and no order to dispossess either in the conclusions of law or in the judgment.

(5) Contrary to their present claim, petitioners specifically argued in the Court of Appeals that their cause or causes of action were purely equitable. Their motion of January 6, 1941 (Transcript, page 75), to dismiss the appeal of law and fact, was upon the sole ground that it was not perfected by the giving of bonds in the amount required (Section 12223-6, General Code), "in that a judgment was rendered in the Common Pleas Court in favor of the plaintiff and others, appellees herein upon an **accounting in equity** in the sum of $18,056.02."

In their reply memorandum on this motion, they clearly state that the action was equitable in these words (page 4):

"There is and was no right to a money judgment in this case, except as it may exist and arise out of the decree establishing **in equity the right, title and interest in the real estate of the heirs of Maurice Patrick Murnan.** That money judgment is not rendered **in action for money only at law.** * * * **The parties were not entitled to a jury trial,** because the judgment arises from the right to an accounting **which can exist only in equity herein,** by reason of the fact that title, posses-

sion and profits belong to the heirs of Maurice Patrick Murnan."

(6) We have the disinterested finding of the Court of Appeals in the opinion overruling the motion to vacate, written by Judge Hornbeck who favored petitioners on the marriage question, that they did not claim the action to be one at law until after the final judgment entry (Appendix III):

> "The second and alternative motion seeks an order vacating our final judgment and the order overruling the motion of appellees to dismiss the appeal on questions of law and fact because this court had no jurisdiction to entertain the appeal as upon questions of law and fact. **The question has been voluminously briefed.**
>
> "The question now raised on this motion **was not at any prior time brought to the attention of the court. The suit of the appellees is in partition. They invoked such action in the Common Pleas Court and likewise in this court** and, subject only to the objection set forth in the motion to dismiss the appeal on questions of law and fact, **interposed no objection whatever to the jurisdiction of this court.**"

(7) It is not true that during the trial of the cause in the Common Pleas Court and the Court of Appeals, counsel for respondents conceded the action was at law in ejectment. Quite the contrary, when the question was first raised by petitioners' motion to vacate after judgment, we vigorously denied in several briefs both the right to raise the question at that time, and the contention that the chancellor in an action for partition and the quieting of title could not determine all questions relating to the remedies sought by them. As was said by Judge Hornbeck supra: "The question has been voluminously briefed."

We opposed these late contentions of theirs in our brief in the Supreme Court, dealing with questions of law, at pages 1-2 and 19-22, urging the **same** contentions as hereinbefore set forth.

All Causes of Action for Partition and the Quieting of Title Are Appealable in Ohio for Trial De Novo.

In Ohio it has been finally decided in the case of **Wagner v. Armstrong**, 93 O. S., 443, that **all partition cases are chancery cases and appealable**, whether involving (Opinion, page 459-460) "simple division of property among co-parceners" or "all other partition cases, wherein further rights and questions are to be determined"; and that this conclusion was "in line with the purpose of the Constitution makers" and **"only substantial justice that a de novo hearing be had, in cases where one man sitting as a court of equity has determined the issues."**

Syllabus 2:

> "All partition cases were originally cognizable in courts of chancery only and must still be regarded as chancery cases and therefore appealable under such terms and procedure as may be provided by law."

Opinion, pages 459-60:

> "It would be particularly unfortunate if the court should attempt to classify partition cases, saying some were and others were not appealable.
>
> "A case wherein simple division of the property among co-parceners is sought may be regarded as appealable. This being so, it follows as a matter of course that all other partition cases, where further rights and questions are to be determined, are likewise appealable.
>
> "We arrive at this conclusion without reluctance. Not only is it the law, but we feel it to be in line with the purpose of the constitution makers and not out of line with the principle of one trial and one review.

> This principle had its inception in the purpose of limiting to one review cases which had been tried by juries, where not only the trial judge, but twelve citizens of the state sitting as a jury, had determined the rights of the parties. In cases where one man sitting as a court of equity has determined the issues, it is only substantial justice that a de novo hearing be had."

It is the law of Ohio that **an action to quiet title** "is equitable in character and is considered as **an action in chancery**" (33 Ohio Jur., page 845); that it is "designed to suppress useless litigation and to prevent multiplicity of suits"; that "in such an action **all matters affecting the title** of the parties to the action may be litigated and determined" (page 847); and that being "of an equitable character, triable in chancery, **neither party has a right**, either statutory or constitutional, **to demand a jury trial**" (page 939).

In the case of Clark, et al., v. Clark, 110 O. S., 664, the Supreme Court of Ohio, having before it a cross petition for the quieting of title, held that such a petition **"indisputably"** constitutes a chancery case, and that a judgment thereon is appealable for trial de novo.

Syllabus:

> "2. When a defendant, in a proceeding to sell entailed real estate, files a cross petition seeking equitable relief under Section 11901, praying that **his title** to premises which are the subject of the proceeding **may be quieted** as against the other defendants, the **said cross petition states a chancery case and a judgment upon the issues set forth therein is appealable.**"

Opinion, page 654:

> "Taking up plaintiff in error's final argument, it is true that the cross petition filed in this case by Oliver H. Clark does state an equitable cause of action, in that it prays to have title to real estate quieted on be-

> half of the petitioner. **Such a petition indisputably constitutes a chancery case."**

In not a single case cited by petitioners was a cause of action to quiet title combined with an action for partition. In all a cause of action in ejectment presented the **paramount** issue with the necessary averment of wrongful possession and a prayer for an order of dispossession.

Even in that class of cases it is held that if one, whom plaintiff claims is a tenant in common with him, disputes his title, the issue may be tried as incidental to the action in partition. Here two nieces of M. P. Murnan filed answers denying his title, and one of them, Margaret Lunn, filed an appeal to the Court of Appeals, and is a respondent here.

Waiver.

These petitioners, by carefully framing their pleadings to state equitable causes only and trying them as such, waived any claim to another mode of trial, or to object after judgment against them.

In the case of Culver v. Rogers, 33 O. S., 537, tried as an equity case for injunction, although involving damages for trespass on land, without protest by **defendant** until after judgment against him, there is a good review by Chief Justice Johnson (Ohio) of the history of the practice in regard to the time and method of questioning the jurisdiction of a court of equity. The following is his particularly pertinent summary, and a quotation from Chief Justice Kent:

Opinion, page 542:

> "To permit the defendant to remain silent on this question, and by answer and trial to contest the case on its merits as a suit in equity, and then, after being defeated, to assign, in this court, as error, the de-

fective prayer of the petition, as a ground of reversa
comports neither with the terms nor with the scope
the civil code. Such a practice would tend to multip
actions, rather than to put an end to controversy. N
is it sustained by authority, either under present
former practice, where law and equity were admini
tered by distinct tribunals."

Opinion, page 543:

"In the same case (page 5) Kent, C. J., says: 'E
answering in chief, instead of demurring, he submitte
his defense to the cognizance of the court; and equi
will, and ought, in such cases, to retain the cause, pr
vided the court be competent to grant the relief, a
has jurisdiction of the subject matter.'" (Ludlow
Simond, 2 New York Cases).

How much more forcibly does this apply to the plainti
who selected the remedies and the forum!

Conclusion.

We submit, therefore, that there is not the slightest bas
for petitioners' claim that the judgment of the Court
Appeals was void and he was thereby denied "due proce
of law."

There was no cause of action at law in ejectment pr
sented by the pleadings or tried by the court. On the co
trary, he chose remedies cognizable in chancery and jud
ment was rendered accordingly. The defeated party
such a judgment has, under the settled law of Ohio, t
right to a trial de novo in the Court of Appeals.

Even if such were not the case, the Court of Appeals h
jurisdiction of the subject matter, and its judgment d
not constitute a denial of "due process." For the sa
reason his voluntary choice and waiver of the mode of tri

estopped him from objecting after judgment was entered against him.

THE COURT OF APPEALS' FINDING THAT GRACE MURNAN WAS THE SURVIVING SPOUSE OF M. P. MURNAN DID NOT CONSTITUTE A FAILURE TO GIVE FULL FAITH AND CREDIT TO THE LAWS OF ARIZONA.

The plaintiff below alleged in his petition that, **as grandnephew**, he was a next of kin and heir of M. P. Murnan, and as such entitled to have his one-ninetieth share of the property set off to him by the partition of Murnan's real estate, as well as to have his title quieted and an accounting for rents since the death of Murnan.

The plaintiff claimed under the sixth subdivision of the Ohio Statute of Descent and Distribution, **Section 10503-4, General Code**, which provides as follows:

> "(6) **If there is no spouse, no children or their lineal descendants, and no parents surviving**, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants per stirpes."

Not only was the burden of proof upon him as an ordinary plaintiff seeking relief, but **as a distant relative** the burden was upon him under this form of statute to show that there were no relatives of the decedent in the classes ahead, i. e., "no spouse, no children or their lineal descendants, and no parent." The uniformity of this rule lead the Court of Appeals to say that "the cases unequivocally support our conclusion that the burden of proof is upon the plaintiff in this instant case," citing **Sorenson v. Sorenson**, 68 Neb., 483, 94 N. W., 540, opinion by Judge Roscoe Pound, and twelve other cases (Appendix I, page 47).

Therefore, the question, which the Court of Appeals was called upon to decide, was: **Did plaintiff prove that at the time of Murnan's death in May, 1937, at Columbus Grace Murnan was not his "spouse"?**

To sustain his burden of proof the petitioner had to disprove three theories or premises supporting a conclusion of marriage, namely, (1) a valid ceremonial marriage at Flagstaff, Arizona, on July 15, 1915; (2) an invalid ceremonial marriage at Flagstaff, but from which "the intent and actual agreement to be married will be imputed by the law to the cohabitation" thereafter in Ohio, to constitute a common law marriage under the law of Ohio **(Johnson v. Wolford**, 117 O. S., 137); (3) without regard to a formal or informal ceremonial marriage in Flagstaff, a common law marriage under the law of Ohio founded upon their declarations, cohabitation as man and wife for 20 years, and the reputation of the marriage, which, "within the discretion of the court, may be sufficient to prove such marriage" (General Code of Ohio, Section 11989).

The fact that the court's conclusion is justified under either the second or third theory, proves conclusively that the question of giving full faith and credit to the laws and records of Arizona is not involved.

Judge Barnes in the majority opinion, as well as Judge Geiger in his concurring opinion, endorsed the second theory and the controlling Ohio case of **Johnson v. Wolford**, 117 O. S., 137, in the following discussion:

> "We take the following from Ruling Case Law, Vol. 18, 'Marriage,' Section 62: * * *
>
> 'An attempted ceremonial marriage in good faith entered into by one of the contracting parties, even though irregular or void will, through the actual agreement to be married and continuous cohabitation establish a valid marriage at common law.'

"This is the pronouncement of our Supreme Court in the case of Johnson v. Wolford, et al., 117 O. S., 136."

* * *

"* * * The evidence is very strong that Grace, at least, thought the marriage in Flagstaff was regular in every particular. She testifies that Pat attended to all the details. This means that he procured the license, secured the magistrate and took care of the papers. If there was any irregularity Pat might be in position to have knowledge thereof and Grace would not. We do not mean to say that there were any irregularities, but are merely canvassing the possibilities. **Mere irregularities, even though they might deny a ceremonial marriage, would not refute a common law marriage under the decision of our Supreme Court in the case of Johnson v. Wolford, 117 O. S., 136."** (Appendix I.)

In the **Johnson case** the facts and the principle of law involved are well stated in the syllabus, as follows (117 Ohio State, 137):

Syllabus:

"Where F., innocently and in good faith enters into a ceremonial marriage with J., which is void when contracted because J. has at the time a valid and subsisting contract of marriage with M., the removal of the impediment to such marriage by the death of M., and the continued cohabitation between F. and J., after the death of M., operate as a ratification and a validation of such marriage as to F. from the date of the death of M., though the death of M. may not have been known to F. and J.; **the intent and actual agreement to be married which inhered in the ceremonial marriage innocently contracted by F. will be imputed by the law to the cohabitation after the death of M. so as to establish a valid marriage at common law."**

At page 143 of the opinion, there is quoted a very pertinent and forceful statement from a New York case:

"In re Crandall's Estate, 214 App. Div., 363, 366, 212 N. Y. S., 210, 212, it was held:

> 'It makes no difference whether such decision is based upon the theory that the courts will infer a consent, or whether it is found as a fact from the conduct of the parties in holding each other out as husband and wife and occupying that relationship. The parties, during all those years, intended to live in lawful wedlock. **Courts will not be solicitous to find a way to nullify such intent and to make the relationship which the parties deemed lawful and sacred unlawful and immoral.'"**

The petitioners not only failed to disprove the defective-ceremony premise for the conclusion of marriage, as well as the ordinary common law marriage, **but failed also to prove that the ceremonial marriage of July 15, 1915, was invalid under the laws of Arizona.**

In support of this latter claim plaintiff relies (1) upon the testimony of Mrs. Murnan, taken upon deposition, that she recollects of only one witness to the marriage ceremony other than the officiating justice and the parties, (2) upon evidence that the clerk of Maricopa county, Arizona, failed to copy the license and certificate into the permanent record, in accordance with the direction of the statute, and (3) upon the fact that the original license could not be produced, although identified and described by two witnesses who saw it in 1915.

Under the Arizona statutes the absence of a permanent record of the license and certificate and the presence of one witness only did not render the marriage invalid, as is apparent from the following section of laws of Arizona in effect in 1915:

> "Section 3844. The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated, and no marriage contract within this state shall be valid **unless a license be issued as provided in this chapter, and a**

marriage solemnized by one of the persons authorized by law or by someone purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties to be such."

The direct evidence supports these essential elements to validity, i. e., that the license was issued, and that the marriage was solemnized by the justice of the peace of Flagstaff, or one whom Mrs. Murnan believed to be the justice. (See Appendix I.)

As in many states where ceremonial marriage only is recognized, the Arizona statutes provide, as do the Ohio statutes, for proof of marriage otherwise than by proof of the record, which is not the best evidence. These statutes, offered in evidence by us as Appellants' Exhibits 15 and 16 (Vol. 4, pp. Z-150, 151) and incorporated by the Court of Appeals in its judgment entry as Finding No. 12, are as follows:

> **"Section 1762.** When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred shall be competent" **(1915 Laws of Arizona).**
>
> **"Section 23-316.** Marriage Certificates—Oral Proof of Marriage— * * * When the marriage is to be proved, evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as married persons, or any other evidence from which the fact may be inferred, shall be competent." **(Arizona Code of 1939.)**

The lapse of 25 years, the death of the justice of the peace, the disappearance of the clerk, and the death of all members of the automobile party but Homer Buyers, em-

phasizes the need of proof of this character. The three volumes of testimony offered by us, corroborated the direct proof of the ceremonial marriage beyond any doubt. This, the petitioners would now exclude from the court's consideration.

The **Legislature of Ohio** also prescribed a rule of evidence of this character, as follows:

> **"Section 11989, General Code.** Evidence of Marriage —Proof of cohabitation, and reputation of the marriage of the parties is competent evidence to prove such marriage, and within the discretion of the court, may be sufficient therefor."

Proof of this character is proof of the ceremonial marriage claimed by the parties; and this is the general rule in states where ceremonial marriage is required, as stated under the title of **"Marriage"** in **18 R. C. L. at Section 57** as follows:

> "The fact that statutes provide for record of marriage does not exclude evidence of habit and repute; **the record is not regarded as the best evidence.** The abstract probative force of habit and repute is not weakened by the fact that the statute provides evidence to prove the same situation. **And, therefore, even when a formal ceremony is required by law,** the law has wisely provided that marriage may be proved by general reputation, cohabitation and acknowledgement; **when these exist it will be inferred that a religious ceremony has taken place,** and this proof will not be invalidated because evidence cannot be obtained as to the time, place and manner of celebration of the marriage."

Such also is the Ohio rule as stated in Ohio Juris., Volume 26 "Marriage", Section 80:

> **"A ceremonial marriage may be proved by admissions of the parties, if no record is made, or if records are made, but are subsequently lost or destroyed. Such**

> **declarations and admissions** of the husband or wife are generally admissible, not as hearsay evidence, but as **original evidence of facts from which the marriage may be inferred**; such admissions may often establish a prima facie case, and are always admissible in evidence as tending to prove the fact of disputed marriage, and they have been held, in some civil cases, **to establish an estoppel where undenied.**"

It might be noted that if ever an **estoppel** was justified, it is justified in this case against these distant relatives claiming under an ancestor, who managed all the arrangements for the ceremonial marriage and made numerous statements to his immediate friends and associates of his marriage to the "richest woman in Columbus," and to whom she gave repeated gifts of money, and upon whose land she built with her own money an investment building at a cost of $52,000.

What the marital status of these parties was when Murnan died in May, 1937, was distinctly a question to be determined by Ohio law. They were life-long residents of Ohio, and lived as husband and wife for 22 years after the ceremonial marriage in Arizona, where they did not reside As this Honorable Court said in **Williams, et al. v. North Carolina,** 63 Supreme Court Reporter, page 207:

> "Each state **by virtue of its command over its domiciliaries and its large interest in the institution of marriage** can alter within its own borders the marriage status of the spouse domiciled there. * * *." (Syllabus 11.)

If the case stood alone upon the proceedings in Flagstaff, Arizona, and the parties separated thereafter, the proof of the invalidity of those proceedings would be controlling. Where, however, as here, the parties resided for

22 years in Ohio as husband and wife, declaring themselves and cohabiting as such, their status at the end of that time is to be determined by the law of Ohio.

In conclusion, we submit that there is no merit whatever in the petitioners' contention that the Court of Appeals failed, in the legal and constitutional sense, to give full faith and credit to the public acts and records of the state of Arizona. A finding that the ceremonial marriage in Arizona in 1915 was valid, was not necessary to the Court of Appeals' conclusion.

In addition, the petitioners wholly failed to prove the invalidity of the ceremonial marriage, because the defects claimed by them, namely, a lack of record and the presence of one witness at the ceremony, are not essential under the laws of Arizona to a valid ceremonial marriage, and because the ceremonial marriage was proved both by direct evidence and by a vast amount of other evidence which, under the statutes of Arizona, in force at the time of the marriage and of the trial, was competent for that purpose. They also wholly failed to disprove a common law marriage under the law of Ohio, based upon the intention and purpose of the parties to marry, as evidenced by the ceremony, and imputed tc their subsequent cohabitation in Ohio.

THE COURT OF APPEALS DID NOT DENY PETITIONERS "DUE PROCESS" BY FAILING TO MAKE NECESSARY FINDINGS OF FACT.

There is no merit whatever in the claim of petitioners that the Court of Appeals did not make the necessary findings of fact, as is apparent from the facts contained in "Statement of Case", supra. And what possible denial of "due process" can be claimed?

We refer to Appendix II, infra, for the findings of fact made on April 7, 1942, in the per curiam approved by Judges Barnes and Geiger. These are eighteen in number and nine relate to the question of the marriage. They cover all the "probative facts from which the ultimate facts can be inferred **as a matter of law.**"

The well settled Ohio rule is thus stated in Ohio Jurisprudence, Vol. 39, at page 1204, as follows

> "Section 459. Finding as to ultimate, as distinguished from evidentiary, facts.—When a party requests a separate written statement of the conclusions of fact and, as an aid to the court, submits special written interrogatories for such purpose, it is the duty of the court, as a part of its judgment, to make answer to all interrogatories involving **the ultimate facts of the controversy and to all involving probative facts from which the ultimate facts can be inferred as a matter of law.** However, in finding the facts separately from the law, the court is not to set out the evidence from which it adduces its conclusions of fact; on the contrary, when a finding of fact is requested, **the facts found must be the ultimate facts in issue.** * * *"

In not a single reported case was there such a complete coverage of the necessary facts. In the two cases cited by counsel (Produce Co. v. Dennert, 104 O. S., 149, and Levick v. Vonnell, 137 O. S., 453), the trial judges had refused to make any findings of fact.

We have the decision of the Court of Appeals that the findings were adequate, and of the Supreme Court of Ohio **that there was no denial of a substantial right** and **no prejudice. What possible denial of "due process" under the Fourteenth Amendment can be claimed, since these questions under an Ohio statute were decided by the highest state courts?**

It is apparent from the conduct of one or two counsel, after the decision of April 7, in bombarding the court with their "Professor Quiz" list of questions for several months, that their purpose was to create confusion. They do not refer to their first list of proposed findings submitted under Rule 9 of the Court of Appeals.

The Court of Appeals was more than considerate when it adopted the form of judgment entry with findings of fact submitted by petitioners. As stated supra, this entry included probative facts not necessary to the court's conclusion, such as a claimed illicit relationship between the parties prior to marriage and the description of the businesses in which they had been engaged at that time.

In this entry also, the petitioners attempted to jockey Judge Geiger into the position of finding common law marriage only, instead of his actual finding that the evidence was sufficient to prove either form of marriage, as stated in his original opinion and in the per curiam finding of facts of April 7 (Appendix II). To their words "this establishes a common law marriage between the parties" (Finding Eighteen), the court added the words "but might well corroborate a ceremonial marriage." In view of his concurrence in the original decision on the merits (Appendix I), and in the original findings of fact (Appendix II), there can be no question but that he adhered to his original opinion that the evidence was sufficient to prove either form of marriage.

We submit that petitioners were not denied any right under the statute, and that they were not legally prejudiced by any denial. Certainly there was no denial of "due process."

PETITIONERS WERE NOT DENIED DUE PROCESS BY THE DENIAL OF THEIR COLLATERAL ATTACK ON THE DIVORCE DECREE OF NOVEMBER 7, 1912.

(For a discussion of this divorce we refer to the Court of Appeals' opinion, Appendix I, page 48, infra.)

These distant relatives of M. P. Murnan claimed the right to attack in 1940 the divorce granted on November 7, 1912, to Grace Backenstoe Murnan from her first husband, George Backenstoe, by Judge Addams of the Court of Insolvency of Cuyahoga county, a court of record having the same general jurisdiction of divorce and alimony matters that the Common Pleas Court of Cuyahoga county had (**Addams, Judge, v. State, ex rel.**, 104 O. S., 475).

Respondents' Exhibit C (Vol. 4, p. Z-142) is an authenticated copy of the divorce decree, "finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty." (Court of Appeals' Finding No. 10.) As the Court of Appeals also found (Finding No. 11): "Thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this case after it was brought into this court."

The evidence offered by petitioners was in the form of a transcript of the papers then (1940) in the files of the Backenstoe case, including an affidavit for service by publication signed and sworn to by Mrs. Backenstoe before a **notary public, who had the same name as her attorney of record.** There was no attempt to identify the notary public

and the attorney as the same person, the matter resting entirely upon the similarity of names. As an Ohio statute directed that an attorney of record should not act as notary public for the particular affidavit, it is now claimed this irregularity made the decree void and that anyone could attack it at any time or place, even distant relatives of a deceased second husband after a period of 28 years.

The Court of Appeals in this case **unanimously held** (Appendix I) that the judgment was voidable only and could not be successfully attacked in this proceeding. They followed a unanimous decision by the Court of Appeals of Cuyahoga county upon identical facts, except that the former wife there made the collateral attack in a matter not involving her property rights, in the case of **Hudson, Admr., v. Owens,** 28 Ohio Law Reporter, p. 221, decided December 17, 1928, opinion by Judge Vickery. **This Honorable Court denied the petition for a writ of certiorari in that case (Owens v. Hudson, Admr.,** 280 U. S., 571), after the Ohio Supreme Court had overruled a motion to certify. (28 O. L. R., 475.)

We quote the syllabus of the Hudson case for the facts and the controlling part of the opinion, dealing with the distinction between void and voidable judgments.

Syllabus:

> "A resident of Cleveland, nine years before his death, on notice by publication procured a divorce from his wife with whom he had formerly lived in Georgia. Subsequently the wife appeared in Cleveland, and brought an action for alimony without asking that the decree of divorce be disturbed, and the court awarded her $1,000, which was paid. Following the death of the husband, an administrator was appointed for his estate, which the former wife caused to be set aside and letters issued to herself on the ground that she was the 'widow' of the decedent.

"**Held:** The conclusiveness of the decree of divorce was in no way questioned by the action of the Common Pleas Court in entertaining the wife's action for alimony, and could be challenged or reversed only by a direct action, brought within the prescribed time, asking that the divorce decree be set aside; and the former wife is now estopped from claiming the right to administer the estate of the decedent as his widow."

Opinion, page 224:

"Now it is claimed, and this must have been the theory upon which the lower courts decided as they did, that inasmuch as this woman had no actual notice and there was an irregularity in that the attorney for the plaintiff who filed the divorce petition verified the affidavit for publication, that the whole proceedings were void and the court had no power to do anything in regard to the matter; that every step was void, and they have quoted some authorities which would seem to indicate that. Unfortunately courts and lawyers and even text book writers have used the word 'void' when they simply meant 'voidable.' They have considered because the decision or contract might be avoided by a proper proceeding that it was, therefore, void. That does not follow. **There is a vast difference between a voidable judgment and a void judgment,** and it was nowhere more strongly illustrated than in the recent case decided by our Supreme Court, in cases taken up from this county and other counties which were heard together, **Tari v. State**, 117 O. S., 481, relative to the ineligibility of a justice of the peace to sit in a liquor case when he was to have a share of the fine and costs, it being claimed that, the justice being ineligible—basing the claim upon the **Tumey case**, 273 U. S., 510, which was decided by Justice Taft of the Supreme Court of the United States,—the judgment was absolutely void and, therefore, the ineligibility of the justice did not have to be challenged in the first instance. **The Supreme Court of Ohio held in Tari v. State, supra, however, as did Justice Taft in the Tumey case, that the question would have to be raised in a**

proper way; that it was a voidable judgment and n a void judgment."

The question in the Tumey (273 U. S., 510) and the Ta (117 O. S., 481) cases is almost identical with the que tion here. In those cases the justices of the peace, wh originally tried them, were disqualified by the Ohio sta ute which gave them an interest in the fines assessed, whi here the notary is disqualified by statute because he ha an interest as attorney for the party seeking the divorc

The conclusion of the Supreme Court of Ohio in the Ta case, based upon an extensive analysis of the opinion the Tumey case, is expressed in the syllabus, as follows:

"1. Interest of a judge in the decision of a cau pending before him disqualifies him from hearing an determining the cause.

"2. Such disqualification is waived unless objectio be made thereto at the earliest available opportunit and if known to the complaining party at or before th trial and if no objection be made in the trial cour will be deemed to be waived.

"3. **Interest of the trial judge does not render th judgment void, but merely voidable."**

At the time the Backenstoe decree was granted, Nover ber 7, 1912, the divorce decree itself was immutable und a long line of decisions by the Ohio Supreme Court, whic are reviewed in **Bay v. Bay**, 85 O. S., 417, the distinctio being drawn between the decree of divorce itself and th property rights involved, as is stated in the syllabus of th case.

Syllabus:

"Where a husband by fraud and false testimony ob tains a decree of divorce for the wife's aggression, an the decree also by reason of the wife's aggression, s found, bars her of alimony, dower and all other inte

> ests in the husband's property, **the decree dissolving the marriage relationship is conclusive**; but, when the court making such decree did not have jurisdiction of the wife's person, **she may thereafter have such decree and the issues opened up so far as they relate to her husband's property** and be let in to defend."

Subsequently, on January 1, 1913, the new constitutional provision became effective which provided for the review of every case tried in the Common Pleas Court by the Court of Appeals. It was held that this provision denied to the Legislature the power to deny appeal in divorce cases. (Zonars v. Zonars, 101 O. S., 518.) However, as the decree in this case was entered almost two months before, the right to a review was determined by the law at that time. It is also true that the change in public policy necessitated by this constitutional change was only modified to the extent made necessary by the constitutional provision, providing only for a **direct** review.

In **Beck v. Beck**, 45 O. A., 507, upon which appellants rely, the attack was direct and not collateral, a controlling argument with that court, as appears from the statement at the bottom of page 510:

> "This being a **direct attack** upon the judgment complained of * * * and **voidable** on the defendant's part."

Petitioners cite a recent decision of the Court of Appeals for Meigs county (In re Estate of Frankenburg, 70 O. A., 495), decided after the decision of the Court of Appeals in this case. In the divorce case there involved, **no affidavit** at all had been filed for service by publication, and in the case described the **property rights of the wife** were directly involved, both of which facts might well have influenced the court, especially in view of the distinction

long recognized in Ohio (**Bay v. Bay,** 85 O. S., 417) be tween the divorce decree itself and the decree concernin property rights of the defendant.

The holdings of the Court of Appeals of Cuyahoga count in the Hudson case and of the Court of Appeals of Frankli county in this case, were that **the divorce decree was no void, but voidable only, if attacked in due course by th defendant; that since each decree recites jurisdiction o the person and subject-matter, and was the decree of a court of record, it imported verity and was good agains collateral attack.** The holding in the Hudson case tha the decree of the Common Pleas Court of Cuyahoga count was good against collateral attack, is also conclusive as t the decree of the Insolvency Court of Cuyahoga county, be cause, as was held by the Supreme Court in a writ of pro hibition against the identical judge—Addams, Judge, v State, ex rel., 104 Ohio State, 475:

> "The Court of Insolvency of Cuyahoga county, i matters of divorce, alimony and the custody of mino children, is by statute granted the same jurisdictio as the Court of Common Pleas." (Syllabus I.)

In Ohio, as pointed out in Shroyer v. Richmond, 16 O. S 455, and particularly at pages 465-466, the question o whether the decree of a particular court imports absolut verity as against collateral attack, is not dependent upo whether that court is one of general jurisdiction, as mos of the courts of the state have their jurisdiction limited b Constitution or statute, but whether it is a court of record

> "But, as was said in the case of Sheldon v. Newton 3 O. S., 500, the distinction is not between courts o general and those of limited jurisdiction, but betwee **courts of record, that are so constituted as to be com petent to decide on their own jurisdiction, and to es tablish it to a final judgment, without setting fort**

> **the facts and evidence on which rendered, and whose records, when made, import absolute verity**; and those courts of an inferior grade * * *"

The chaos which would result in the settlement of family estates if distant relations, like these petitioners, were permitted to dig back into the files of old divorce cases to show some irregularity in the proceedings, and to contradict the findings of a court of record granting the decree, must be readily apparent to this court. We respectfully submit that these distant relatives, who had no property rights and no interest, direct or indirect, at the time the decree was granted in the Backenstoe case, have not been denied due process by the decision of the Court of Appeals in this case.

CONCLUSION.

When the true premises are known, there is no federal question in this case of any merit. For that reason it seems unnecessary to quote to this Honorable Court its decisions defining the "full faith and credit" and the "due process" clauses. The petitioners' own quotations are sufficient, if any are necessary.

There was no invasion of the "full faith and credit" provision of the Constitution in the finding by the Court of Appeals that Mr. and Mrs. Murnan were husband and wife on May 12, 1937, the date of his death, because:

1. They were life-long residents of Ohio, and the determination of their marriage status from their conduct and cohabitation during the 22 years following the 1915 ceremonial marriage in Arizona, is controlled by the law of Ohio; and

2. The ceremonial marriage itself was not invalid unde the laws of Arizona, and, even without the direct evidence was proved by three volumes of evidence declared com petent by the statutes of Arizona.

There was no denial of "due process" to the petitioner in the conduct of the trial and the judgment of the Court o Appeals, because:

A. The Court of Appeals had general jurisdiction of th subject-matter of this case, as well as of every other cas decided by a Common Pleas Court in its district, by virtu of the express provisions of the Constitution of Ohio, an its judgment herein was, therefore, not void;

B. The mode of trial prescribed by the statutes of Ohi is a question for decision by the Court of Appeals, and it decision thereof does not constitute a denial of "du process", because unfavorable to a litigant;

C. The petitioners chose their mode of trial by seekin equitable relief only, and securing that relief, namely, de crees in partition, quieting of title and accounting, in th Common Pleas Court, and waived thereby any claim to a action at law;

D. The trial of this case de novo in the Court of Appeal was in accordance with the settled law of Ohio for cause of action in partition and the quieting of title;

E. The Court of Appeals liberally accorded to petitioner their right under Ohio statutes to have findings of fact; an the determination of what was, or was not, a "probativ fact from which an ultimate fact may be inferred **as a ma ter of law"**, was for that court, and its conclusion thereo was not a denial of "due process";

F. The Backenstoe divorce decree of November, 191 was voidable, not void, because of the alleged irregularit

in the claimed disqualification of the notary public; and was not subject to collateral attack in 1940 by these distant relatives of a second husband, none of whom had any interest in the divorce case, direct or indirect, at the time of its decision.

We respectfully submit that the petition herein should be dismissed.

Respectfully submitted,

HENRY L. SCARLETT,
MARVIN HARRISON,
HARRISON & MARSHMAN,
Counsel for Respondents.

APPENDIX I.

In the Court of Appeals of Franklin County, Ohio.

Ralph Rea, Plaintiff-Appellee, vs. Margaret Fornan, et al., Defendants-Appellants.	Nos. 3295, 3300, 3301, 3302.

Decision on Merits.

(Rendered on the Twelfth Day of March, 1942.)
(46 N. E. (2d), 649.)

Barnes, J.:

The above-entitled cases are now being determined de novo by reason of separate appeals on questions of law and fact from the judgment of the Court of Common Pleas of Franklin county, Ohio.

By stipulation it is agreed that the transcript of docket and journal entries, original papers and transcript of evidence as filed in a single case may be considered as filed in each of the separate appeals without the necessity of making and filing separate transcripts, original papers, etc.

In effect, this means that the several appeals are consolidated and one opinion shall be determinative of each and all of the cases.

(Note—Subject headings and emphasis throughout the opinions have been supplied by counsel for respondent.)

This is the second time this case has been in our court. At a former term we reviewed a judgment of the Common Pleas Court, determining the issues in favor of one of the defendants and dismissing plaintiff's petition.

At that time we reversed the Common Pleas Court for the reason that the court made its finding and decree without permitting plaintiff to present its evidence upon a vital issue in the case. Before the cause came up for second trial the principal defendant, Grace D. Backenstoe, had deceased, and the action was revived against her next of kin.

The second trial resulted in a finding and a judgment for the plaintiff and ordered a partition of the 17 tracts of real estate specifically described in the petition. Thereafter, the requisite steps were taken through which the action was carried to our court through separate appeals on questions of law and fact by certain defendants, all being similarly effected by the judgment of the trial court. As heretofore stated, the action was one for partition, but when the issues were finally joined the entire controversy resolved around the question as to whether or not Maurice Patrick Murnan and Grace D. Murnan, referred to in the petition as Grace D. Backenstoe, were married at the time of Pat Murnan's death.

(The Pleadings and Issues.)

As against the defendant, Grace D. Backenstoe, plaintiff in his petition alleged that Grace D. Backenstoe, who claims some interest in the premises described in the petition, had been in possession thereof since the death of Pat Murnan, May 12, 1937, and during such time had collected the rents and profits therefrom without accounting, and will continue so to do unless otherwise ordered by the

court. In the prayer of the petition it was asked that Grace D. Backenstoe be required to set up what, if any, interest she claimed in the premises, and that the same be declared void; that she be required to account for the rents and profits received by her; that a trustee be appointed and for other relief.

As against all other defendants the prayer was for partition.

Plaintiff's petition was filed February 28, 1938, and on March 31, 1938, Grace D. Backenstoe filed answer. The answer in substance averred that many years ago she was Grace D. Backenstoe, and under that name is made one of the defendants in the cause.

"Further answering, this defendant says that she is the surviving spouse of one Maurice Patrick Murnan who died intestate on May 12, 1937, owning certain real estate; that said Maurice Patrick Murnan, deceased, leaving no parent surviving him and leaving only this answering defendant, Grace Murnan, as his surviving spouse, that as such this defendant is the only heir at law and next of kin, and by virtue of that relationship this answering defendant inherits from Maurice Patrick Murnan all of the real estate of which he died seized."

In the prayer it was asked that plaintiff's petition be dismissed, etc.

Prior to the first trial in the Common Pleas Court counsel for plaintiff and some of the claimed defendant heirs duly took the deposition of Grace D. Backenstoe at her then residence known as Graceland, and located on North High street, Worthington. At the time this deposition was taken Grace Murnan was sick in bed with what proved to be her last sickness. Her counsel presented to the court a medical certificate from her attending physician to the

effect that she was not physically able to attend the court hearing. However, no postponement of the hearing was requested on this account.

Following her death and the revivor of the action, several of the new defendants, claiming to be heirs of Grace Murnan, filed answers. These several answers restated the substances of the answer of Grace Murnan and in addition they contained a general denial of plaintiff's petition. It will be noted that the answer of Grace Murnan did not contain a general denial of plaintiff's petition. We mention this at this time since it is urged that the state of the pleadings controls the question of burden of proof. This question will be discussed more fully later in the opinion.

On February 24, 1939, Mary Meyer, a claimed direct descendant of Maurice Pat Murnan, filed an answer and cross-petition which, in addition to the requested partition of the 17 different tracts of real estate described in the petition, also described and asked partition of the North High street 71-acre farm, known as Graceland.

The cross-petition also asked for the appointment of a receiver, setting out that since the death of Grace Backenstoe her executor had been collecting the rents and profits from all the real estate referred to in the petition and cross-petition. At the time of the filing of the cross-petition by Mrs. Meyer the recorded title to Graceland was in the name of Grace Daugherty Murnan, the deed therefor being from Maurice Pat Murnan to Grace Murnan, his wife, dated March 17, 1922, but not recorded until after the death of Pat Murnan. It was the claim of the cross-petitioner that it had not been delivered prior to the date of death of Pat Murnan.

The latter had acquired the property in 1919 by purchase.

While we are on the subject of the show place known as Graceland, we might say that the evidence relative to the execution and delivery of the deed from Murnan to his wife, Grace Daugherty Murnan, is amply supported, and therefore we need give no further consideration to this particular tract of land sought to be brought in for partition under the cross-petition.

However, following the filing of the cross-petition the trial court appointed a receiver for the seventeen tracts in the person of R. W. Kilbourne, who at the time was also acting as the executor of the Grace Daugherty Murnan estate.

With this brief history of the issues joined under the pleadings we now come to a consideration of these factual issues with the attending procedural questions. By stipulation of counsel it was agreed that a transcript of the testimony taken before the trial court, supplemented by such additional testimony as either side might desire to present, either as depositions or in the form of depositions, including identified exhibits, should constitute the evidence in our court. For convenience it was again agreed that this evidence would be divided into four volumes: Volume I, consisting of 292 pages, was the evidence presented to the trial court; Volume II, containing 172 pages, plus exhibits, and containing testimony of 14 persons on behalf of appellants; Volume III, consisted of additional testimony of appellants taken by depositions at different times and described as Detroit, Michigan, depositions and Cleveland deposition; Volume IV contained identified exhibits of former volumes and two depositions, one by plaintiff and the other by defendant, taken at Flagstaff, Arizona, being

the testimony of Miss Mary P. Lewis, present clerk of courts of Flagstaff, Arizona, and also the extended testimony of some other witnesses.

It at once becomes apparent that the reading of this mass of testimony is a laborious task. However, we have waded through it and read every word of it. The briefs of counsel are very helpful in that they have brought to our attention the pertinent court decisions not only in our state, but also in sister states, and in addition have at length copied excerpts from the testimony of practically all the witnesses. Several briefs also contain indexes, but we are sorry that we are unable to compliment this effort If there is anything we dislike, it is making up an index in alphabetical order. What we desire is topical headings and thereunder references in chronological order. If counsel are interested in what the court thinks is the most helpful form of brief we would refer them to Rule VII of the court.

(The Burden of Proof.)

Before we take up an analysis of the evidence it is proper to determine the controverted question of "burden of proof."

It is the claim of plaintiff, since there is no dispute that the petition correctly lists the blood relatives of Pat Murnan and the degree of kinship, that the claim of Grace Murnan and her privies that she was the widow of Pat Murnan, constitutes an affirmative defense and therefore the burden would be upon her to establish that she was his widow. On the other hand, it is the claim of defendant in this court (although not very seriously contended in the lower court) that merely establishing relationship does

not establish heirship, and that since the petition alleged that Mrs. Murnan was in possession of the premises sought to be partitioned, the plaintiff and his co-relatives would only become heirs after other classes, including the widow would be eliminated.

We think a rule of reason, as well as the authorities support the conclusion that in the instant case the burden of proof is upon the plaintiff.

Generally the burden of proof is upon the plaintiff a or at least it is on the person who holds the affirmative i any controverted question. When the burden of proof i established under this rule, it never changes, although there may from time to time be a change as to the obligation of going forward. This frequently happens where the strict observance of a rule of proof might require a party to prove a negative, but even when these situations arise the burden of proof is not changed. We are unable to agree with counsel for the plaintiff that the answer of Grace Murnan, by reason of not containing a general denial was in effect an admission of the allegations of plaintiff's petition. The effect of her answer was to challenge the allegations of the petition that the plaintiff and the groups referred to in his petition were the heirs of Pat Murnan. If Grace Murnan was the widow, the plaintiff and defendant groups similarly related could not be heirs. The classification into which plaintiff seeks to bring himself and certain of the defendant groups is subdivision 6 of Section 10503-4, General Code, which reads as follows:

> "6. If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes."

Before relatives can be considered heirs, all the persons mentioned under subdivisions 1, 2, 3, 4 and 5 must be eliminated. The first five words under subdivision 6 read, "If there be no spouse." The mere allegation of the petition, either directly or indirectly, that there was no spouse can not establish this material fact when a named defendant comes in and files answer averring that she is a surviving spouse. Added reason for the rule in the instant case is the fact that the petition alleges that this defendant was in possession since the death of Pat Murnan and collected the rents and profits.

Sincerity of belief on the part of plaintiff and kindred defendant groups that the defendant Grace was not the spouse would not alter the rule of proof.

The further fact that under some situations this rule would place upon a claimed heir the burden of proving a negative and require making inquiry in every country and city in the United States and all foreign countries is not persuasive. Even so, we can not determine that the difficulty in procuring evidence changes the burden of proof. In practical effect we doubt if any situation would ever arise as is apprehended under the above situation.

We have been referred to the following authorities which we think amply support our conclusions:

Sorenson v. Sorenson, 68 Neb., 483 (94 N. W., 540);
In re Evans Estate, 291 N. W., 460 (Iowa, 1940);
Wherman v. Savings Bank, 259 N. W., 504 (Iowa 1935);
Boulder v. McIntyre, 119 Ind., 574 (21 N. E., 445, 1889);
Schuhart v. Schuhart, 61 Kan., 597 (50 L. R. A., 180, 1900);
Gibson, Admr., v. Commonwealth, 257 Ky., 487 (78 S. W. (2d), 336);
Hopkins v. Hopkins, 287 Mass., 542 (192 N. E., 145);

Voliotes v. Ventorria, 86 N. H., 52 (161 Atl., 921)
Kellog v. Lumber Co., 44 S. W. (2d), 742;
Bishop on Marriage and Divorce, 6th Ed., Sec. 457
18 C. J., Descent and Distribution, Secs. 124, 126, 129
18 R. C. L., p. 428;
Emerson v. White, 29 N. H., 482;
Mitchell v. Thorne, 134 N. Y., 536 (32 N. E., 10);
Savery v. Taylor, 102 Mass., 509;
Thompson on Real Property, Vol. V, Sec. 2445, p
199;
Proctor v. Lowe, 105 N. J., 506 (148 Atl., 787, 1930)

We will not add to the length of this opinion by makin quotations from the above cited authorities, **but do sa very emphatically that the cases unequivocally support ou conclusion that the burden of proof in the instant case i upon the plaintiff.**

Plaintiff-appellee and other claimed heirs similarly situ ated, through their counsel, urge very strenuously and con vincingly that Maurice Patrick Murnan and Grace Daugh erty Backenstoe were never married. This claim is base on two distinct reasons: first, that Grace Daugherty, many years ago, was married to one Backenstoe, and that no lega divorce having been obtained, she is still the wife of Back enstoe and therefore, under the law, would be unable t legally contract a marriage with Pat Murnan.

As a second claim it is urged that the evidence conclu sively establishes that no marriage contract, either cere monially or at common law ever existed between Maurice Pat Murnan and Grace Daugherty Backenstoe.

We take these questions up in the above order.

(The Backenstoe Divorce—1912.)

The evidence conclusively establishes that Grace, wh was born Daugherty, many years before her acquaintanc

with Maurice Pat Murnan, was married to George Backenstoe. In the year 1912, she brought an action in the Insolvency Court of Cuyahoga county for a divorce against her then husband, George Backenstoe. Personal service was not obtained and an affidavit was filed in the usual form for service by publication. This affidavit, duly signed by Grace Backenstoe, was sworn to before a notary public who was her acting attorney in the divorce action.

In December of 1912, the cause came on to be heard and a divorce was granted to Grace Backenstoe. It is now urged that the Insolvency Court of Cuyahoga county had no jurisdiction to entertain the action for divorce for the reason that no legal affidavit had been filed as a condition precedent for service by publication.

It must be conceded that Grace Backenstoe's attorney did not have the authority under the then existing law to act as a notary public in swearing her to the affidavit as a predicate for service by publication. See the following sections: 11524 G. C., 11527 G. C., 11532 G. C.

Counsel for appellee in support of their claim that the divorce could not legally be granted, cite the following authorities:

State v. Jackson, 36 O. S., 281;
Beck v. Beck, 45 O. App., 507;
North Star Lbr. Co. v. Johnson, 196 Fed., 56;
Kingsborough v. Tonsley, et al., 56 O. S., 450.

The case of Beck v. Beck, supra, is very similar except in that case it was a direct attack and therein the court held that the court was without jurisdiction of non-resident defendant in divorce action. On page 510 of the opinion, near the bottom of the page the court calls attention: "This being a direct attack upon the judgment complained of," etc.

The first case cited was a criminal action charging per jury. The pertinent question was as to whether or not the officer purporting to administer the affidavit had the au thority so to do. Determining that no such authority ex isted, there could not be perjury. (Other cases cited indi cate that they involved direct attacks.)

We are referred to the case of Hudson, Admr., v. Owens Vol. 28 O. L. R., 221, decided December 17, 1928. This was decision by the Court of Appeals of the Eighth District opinion by Vickery, J. The factual situations are identical with the instant case. The affidavit for service by publica tion was verified by the attorney acting as a notary public The syllabus presents an understandable history with the legal announcement:

> "A resident of Cleveland, nine years before his death, on notice by publication, procured a divorce from his wife with whom he had formerly lived in Georgia. Subsequently, the wife appeared in Cleve land, and brought an action for alimony without ask ing that the decree of divorce be disturbed, and the court awarded her $1,000.00 which was paid. Follow ing the death of the husband, an administrator was appointed for his estate, which the former widow caused to be set aside and letters issued to herself on the ground that she was the widow of the decedent.
>
> "Held: the conclusiveness of the decree of divorce was in no way questioned by the action of the Com mon Pleas Court in entertaining the wife's action for alimony, and could be challenged or reversed only by direct action, brought within the prescribed time, ask ing that the divorce decree be set aside; and the former wife is now estopped from claiming the right to ad minister the estate of the decedent as his widow."

Counsel for appellee argue that the legal pronouncement in the Hudson case, supra, was not applicable to the instant case for the reason that the reported case was a review from

a decision of the Common Pleas Court, whereas in the instant case the attempted decree was by the Insolvency Court.

We are unable to see that this distinguishes the two cases. The claim that the Insolvency Court is a court of limited jurisdiction can make no difference, for the reason that it had been granted equivalent jurisdiction to that of the Common Pleas Court. It is quite correct to state that all courts are more or less of limited jurisdiction. The Legislature has the unqualified authority to prescribe the jurisdiction of any and all trial courts. The mere fact that the insolvency court did not have the jurisdiction to enter into all fields to which the right was given the Common Pleas Court could make no difference. The fact that they were given jurisdiction equal to and like the Common Pleas Court in divorce and alimony matters would be all that was required.

The decision of the Supreme Court in the case of Adams, Judge, v. State, ex rel., 104 O. S., 475, is enlightening and in point.

It is our conclusion that the evidence in the instant case sustains the claim of a legal divorce having been granted to Grace Murnan in 1912, at least as against a collateral attack.

This brings us to a consideration and determination of the vital issue in the case.

(The Evidence of Marriage.)

Was Grace Backenstoe Murnan married to Maurice Pat Murnan at the time of the latter's death in 1937? These two people for many years were well known underworld characters in the city of Columbus, Pat was a big gambler and Grace, the madam of a well-established sportinghouse.

Both engaged in a disorderly business, yet each sough to conduct their business in an orderly manner. Neithe was ever arrested. While both were continuous law vi lators, they both were considered unusually honest, pa ticularly among people who considered their respectiv businesses as necessary evils. Pat Murnan was previousl married, his wife having died in about 1912. Grace ha previously been married to George Backenstoe and she wa granted her divorce in November, 1912. During the latt part of the year 1914 or the early part of the year 191 Pat was paying more than usual attention to Grace. I June of 1915 Pat took Grace on a trip to the Pacific coa and the California Exposition. The trip was made b automobile. The acting chauffeur and mechanic wa Homer Byers. Tommy Stewart, a former employee of Mu nan's, also accompanied the party on the trip. During th stay in California Grace was sick and unable to attend th Exposition, except for one-half day. During the latter pa of July the party started back.

When they reached Barstow, California, Pat and Grac on account of the latter's sickness, took the train to Fla staff, Arizona, arranging that the chauffeur and his help would drive the car through the Great American Dese This arrangement placed Pat and Grace in Flagstaff a da or so ahead of the chauffeur. According to the testimon of Grace given in her deposition taken during the ye 1939, it was during this day or two's stop in Flagstaff th she and Pat were married. The marriage took place befo a justice of the peace. Pat made all the arrangements.

Following the deposition evidence of Grace, giving Fla staff, Arizona, as the place of marriage, and July, 1915, the time, counsel representing both sides of this contr

versy investigated the marriage license records in the proper office in Flagstaff, Arizona, and through deposition evidence subsequently taken developed the fact that the records do not disclose any marriage license having been issued to Pat Murnan or Grace Daugherty. Starting from this point both sides have exhausted their efforts in seeking supporting evidence to sustain their respective contentions. The Arizona statutes in effect in 1915 were introduced in evidence. One of the specific provisions of the Arizona statute is not to recognize the common law marriages in that state. The pertinent sections provide for the issuing of licenses and designate the individuals who can perform marriage ceremonies.

It is also a requirement that the individual performing the ceremony shall have the contracting parties sign at the proper place and he shall certify the fact of their marriage and return the certificate to the clerk's office where it shall be recorded in a permanent record.

While the different sections of the Arizona Code provide much detail in the interest of having and preserving records, yet, as we view it, the only thing essential to constitute a ceremonial marriage was the issuing of a license to the contracting parties and the performing of the ceremony by a designated person under the statute. While the performance of all the ministerial duties would be important to all couples marrying in the state, yet the failure to perform mere ministerial duties would not void a ceremonial marriage, if, in fact, it was duly performed. This principle of law is directly announced by Section 1217 of the statutes of Arizona. To the same effect, see Section 3844 of the Revised Code of Arizona.

Of course, the presumption is very strong that the proper officer of the state of Arizona took care of his rec-

ords in a proper manner, and the fact that the bound volum contains no record of a license having been issued to Pa Murnan and Grace Daugherty argues very strongly tha no such license was ever issued. Considering the ver full and complete testimony of Miss Mary P. Lewis, cler of courts of Flagstaff, Arizona, as presented in her depo sition, we necessarily arrive at either one or the other o the following conclusions:

First, no marriage license was ever issued to Pat Murna and Grace Daugherty; or, second, the county clerk faile to make a record of the issuance of such a license. Thi failure might be wilful or accidental. For instance, if Pa Murnan went into the clerk's office and procured a licens to marry, such a license could be issued by the clerk with out at the same time making a record of the fact in suc issuance.

After the justice of the peace performed the marriag ceremony he could deliver the marriage papers to the con tracting parties, although there was a statutory require ment that he make a return to the clerk's office. The count clerk testifies that it sometimes happens that the perso performing the marriage ceremony does deliver the mar riage license containing the certificate of the marriag ceremony to the contracting parties to be by them delivere to the county clerk. If the contracting parties, entruste with the delivery of the certificate of marriage to the count clerk, fails so to do, this would not void the marriage, bu would merely negative the desired record.

The chauffeur, Homer Byers, testifies that when he ar rived at Flagstaff with the big, open Packard car and drov it into the garage, that he received some information fro the garage man that caused him to go to the court hous

and into the clerk's office; that he inquired about a marriage license between Pat Murnan and Grace Backenstoe, and that the clerk threw out a document and then and there he saw and read the marriage license contract between Pat Murnan and Grace Daugherty. The difficulty with this witness' testimony is that he saw too much. Many of the things which he says he saw and read on the document are not contained in Arizona marriage licenses.

It sometimes happens that the clerk before issuing a license required the applicant securing the license to sign an affidavit. According to the testimony of the county clerk, the affidavits are most frequently required where there is some doubt as to the age of one or both of the contracting parties, although sometimes they are required in other instances. These affidavits are not required to be recorded, nor are they required to be preserved. The present county clerk was able to find in her office for the year 1915 an average of one affidavit to every six licenses. This affidavit form would more nearly conform to what Chauffeur Byers says he saw and read in the county clerk's office, but there would still be a substantial variance. One of the incidents in his testimony is the fact that he states that the contract of marriage was between Pat Murnan and Grace Daugherty. We think from other parts of his testimony he had always known her as Grace Backenstoe.

An effort was made to impeach the testimony of the witness by showing that many years previous when the trial court was prosecuting attorney, the witness testified falsely in a certain criminal action. The form of this inquiry indicates that counsel was propounding the impeaching questions from a transcript record, possibly a bill of exceptions. The witness did not admit that he had made

the allegedly false statements, but said that he could n remember what his testimony was in that particular cas The groundwork was clearly laid to present the impeachin testimony, but for some reason this was not done. It w the view of the trial court that this witness was not worth of belief. If we were reviewing as an error proceeding, w would accept this view of the trial court without questio but since we are determining the matter de novo, we can n overlook the omission of the impeaching testimony.

After the party left Flagstaff there is evidence of a incident that happened at Colorado Springs. Murnan an his party had stopped in front of the Antlers Hotel. M Charles Schaefer, a merchant tailor of 52 East Broa Street, Columbus, Ohio, had been to the California Exp sition with about 150 members of the local Shrine. H stopped at Colorado Springs on his return and gives th date as July 27. Mr. Schaefer saw and recognized M Murnan, stepped out of the car and spoke to him. M Murnan immediately introduced him to Mrs. Murnan. "H says, 'Charley, we are married'; and I said, 'Is that right He said, 'Yes, we were married in Arizona, and are on o wedding trip.' "

The next episode brings us to Columbus, Grace retur to her house at 140 Front Street and Pat does to h mother's. The evidence is uncontradicted that upon t return to Columbus no public announcement was made the claimed marriage. Quite a few witnesses are call who testified that both Grace and Pat at different tim confided in them as to their marriage, but generally ask them not to say anything about it. The reason for kee ing it secret was generally understood to be on account their respective businesses. At this time Pat was in t

taxicab business. According to the witnesses it was the view of Pat and Grace that a public announcement would be injurious to the taxicab business.

One of the incidents of letting the marriage be known to friends was a happening in the fall or winter of 1915 when Pat and Grace made one of their frequent trips to Mt. Clemens, Michigan. At that time there was living in Detroit a Mr. and Mrs. Carey, both of whom had formerly lived in Columbus. On the way to Mt. Clemens the Murnans stopped at the Carey home and invited them to a fish dinner on the following evening at Mt. Clemens. They accepted the invitation and Pat's chauffeur came in for them, a distance of about 27 miles. Just as they were seated at the table Pat told them this was their wedding dinner for them, further stating that they had been married on their trip during the summer. Carey said that Pat told him about the officer that performed the ceremony, but that he could not recall the peculiar name that he gave to him, but he said that he gave him a tip of $20.00, when he was only supposed to pay 50 cents or a dollar.

Another incident of moment is presented through the testimony of Louis Novario. He now lives and runs a bowling alley in Cleveland, but in years past was frequently in Columbus. As a youngster he was a page in the Ohio Senate and later indicates he was a right-hand man of Theodore E. Burton during his candidacy for the United States Senate. Later the witness was connected with the State Highway Patrol and worked out of the office of Governor Bricker. His first acquaintance with Pat Murnan was when he was making the arrangements for taxi service for Senator Burton. During the time he was living in Columbus he also became acquainted with Grace Backen-

stoe. He would go to her place very frequently and drink with her. He relates an occasion in December, 1915, when he was in this house of Backenstoe's on Front Street with another girl, and the three of them were in the recreation room, drinking; that Pat walked in and joined them. The witness at this time says that he said to Pat, "What is this that I hear about you two being married," Grace then spoke up and said, "We can trust Louie," and the four of them then proceeded upstairs to Grace's very beautiful bedroom; that she went to a safe or a panel in the wall and got out a paper and showed it to him, and he said it was the marriage license of Maurice Pat Murnan to Grace Daugherty. He says that he asked about the name "Daugherty," as he had always understood the name to be "Backenstoe," but she told him that she had been restored to her maiden name of "Daugherty." The witness says that Pat and Grace told him that they were married while they were away; further, that on this occasion Pat asked him to get in touch with the diamond merchant from whom Grace had been buying her diamonds, which he did, and it resulted in Pat buying for her a seven-carat diamond, and at the same time or a little later, a very beautiful and large diamond lavaliere.

The testimony of this last witness was only discovered after the case was appealed to our court. He was not a witness in the trial court. This testimony is strongly supporting.

A longtime employee as chauffeur, both before and after 1915, testified that during that year when he was working in Pennsylvania he received a post card from Pat and Grace announcing their marriage on their western trip.

Anna B. Beyerly was also called as a witness. She had lived a very active life and at the time of taking her testi

mony was a woman in advanced years. Prior to 1915 she owned a farm north of the city and approximately two miles from the farms subsequently purchased by Pat Murnan. Some two or three years prior to 1915 Pat Murnan arranged with Mrs. Beyerly to take care of two registered calves. After this arrangement was made he would frequently drive out to see them. Some time after the middle of 1915 he drove out and had Grace in the car. Mrs. Beyerly testifies that he called her over to the car and introduced Grace as his wife. This acquaintance was continuous after the Murnans moved out to Graceland up until the time of the death of Pat Murnan.

Margaret Lunn was also called as a witness on behalf of the defendant. Mrs. Lunn was a niece of Pat Murnan. She testified that shortly after the birth of her daughter on August 31, 1919, she visited her grandmother, Mrs. Margaret Galvin, on one occasion when Pat was at the home. Mrs. Galvin was Pat's mother. She further testifies that this was about the time that the Murnans had moved to the farm. She further testifies that on this occasion Mrs Galvin asked Pat if he was married and he answered, "Yes, mother, I am." "And he made a motion to get papers out of his pocket. Grandma says, 'It isn't necessary to show me any papers. If you say you are married, Maurice, that is all that is necessary, because you never told me a lie in your life.' "

Counsel for defendant also called as a witness a man who had been in the saloon business and he testified that in 1915 Pat told him that he and Grace had been married on their trip out west and at that time treated all patrons then in the saloon.

There are several other persons to whom either Pat Grace or both, confided that they had been married Arizona on this western trip.

Aside from the more or less intimate friends or asso ates, the public generally were not informed as to t claimed marriage between Pat and Grace.

They continued to act as single persons. Grace's spo ing house was continued under the name of Grace Back stoe. Deeds or other documents were signed and execut as single persons. Their bank deposits and signature ca were just the same as before. Within a year or two af this claimed marriage, Pat negotiated a trade of two pie of real estate. He executed the deed as a single man, c veying his property to his grantee and the second party the trade executed the deed to Grace Daugherty, wh became the residence of Grace's mother, and remained until the latter's death.

In 1917, after we became involved in the World W the Government issued an order prohibiting the operat of houses of ill fame within five miles of a military cant ment. This caused Grace, as well as all others in like bu ness, to close their business and this occurred in Aug 1917. Thereafter, for a period of time she continued operate the place as a legitimate rooming house, but so time later, the exact time not being known, the busin was closed up in its entirety. Sometime in 1919, a mar change arose in the lives of these two people. This the time they moved to the 71-acre farm known as Gra land. Throughout the record it is spoken of as a sh place, and as being located in an aristocratic distr From this time on all deeds and other documents execu by either were executed as a married person, with rele

of dower by the other. There are some ten or eleven instances where deeds were executed. One of the first deeds was that for Graceland and purported to be a deed from Pat Murnan to Mrs. Grace Murnan, his wife. From this time on there was presented a procession of witnesses from all walks of life, supporting the claim that Pat Murnan spoke of and introduced Grace as Mrs. Murnan.

There was also evidence presented that Grace sold her property on Front Street to the Lazarus Company for a consideration of something more than $50,000.00, and shortly thereafter and during the same year took out a building permit to build a $50,000.00 structure on one of Pat's lots. As we understand, this is one of the properties sought to be partitioned at this time. Evidence is introduced that Pat spoke of this business building as belonging to Grace, although it now develops that the title was in Pat.

This record presents much additional evidence supporting the respective claims of the litigants, but it would merely be cumulative in character and we do not deem it advisable to further review the evidence.

We find little, if any, controversy as to the applicable law. There is a marked difference as to its application.

(The Law of Marriage.)

We start with the well-recognized principle that the lex loci is controlling on marriage contracts as well as all others. Under the laws of Arizona common law marriages are not recognized. Under the situation in the instant case it is our judgment that the marriage of Pat and Grace must be based on the proof of a ceremonial marriage or none at all.

It would not always follow that claim of ceremoni marriage would defeat proof of common law marriag For instance, where one of the contracting parties honest believed that a ceremonial marriage had been performe and later discovered that there was some defect whi went to the substance, then and in that instance a theo of common law marriage might obtain.

One of the latest cases decided by our Supreme Cou is entitled In re: Estate of Redman, 135 O. S., 554. Th decision is a per curiam. This case makes the pronounc ment that to constitute a common law marriage the esse tial elements must be shown by clear and convincing ev dence and an agreement in praesenti is necessary.

A first reading of this case might indicate that the ru of law requiring common law marriages to be support by evidence of agreements in praesenti was being emph sized. A careful study will disclose that the peculiar fa being considered was responsible, for the court's pronounc ment. In this reported case the claimed husband, who w seeking curtesy in his wife's property had presented ev dence that the two had lived together as man and wife a had been introduced to their friends as such. However, t husband testified in answer to a question put to him cross examination as to whether or not he and his pa mour had ever talked about marriage, said that they h talked about it, but "not for them." This testimony at on refuted any claim of marriage and occasioned the cour pronouncement of the rule requiring agreements praesenti.

This in no sense was a new rule. The Supreme Cou had made the identical pronouncement in the case of U benhower v. Labus, 85 O. S., 238. On page 248 of the op

ion Judge Price quotes from the case of Bruner v. Briggs, 39 O. S., 478:

"A marriage in fact may be established by showing that they lived together and cohabited as husband and wife for a series of years, that they always recognized and treated each other as such, and that they were so treated and reputed in the community and circle in which they moved, although no record evidence was offered, nor the evidence of any witness who saw them married was given. Such is competent and its sufficiency to establish the fact of marriage is for the court or jury trying the issue to determine."

The above in effect refers to a rule of proof.

To the same effect we quote from Ohio Jurisprudence, Vol. 26 (Marriage), Section 80:

"A ceremonial marriage may be proved by admissions of the parties, if no record is made, or if records are made, but are subsequently lost or destroyed. Such declarations and admissions of the husband and wife are generally admissible, not as hearsay evidence, but as original evidence of facts from which the marriage may be inferred. Such admissions may often establish a prima facie case, and are always admissible in evidence as tending to prove the fact of a disputed marriage, and they have been held, in some civil cases, to establish an estoppel, where undenied."

Also, see Section 81:

"It is a general rule that marriage may be shown by habit or repute, and in Ohio, that a marriage may be proved by reputation, as, for example, by a reputation of living together as husband and wife; evidence of cohabitation as husband and wife, and of mutual recognition of that relation by the parties, is competent as tending to prove the marriage. Thus, when the right to succession of an estate depends upon the existence of a marriage, such marriage may be proved by the reputation of the parties."

"A ceremonial marriage may be proved by cohab
tation, when no record is made, or, if made, when it
lost or destroyed. A common law marriage may
established by direct evidence of the contract or, as
usually done, by proof of cohabitation, and reputati
thereof, sufficient to establish the marriage. Eviden
of cohabitation, and reputation thereof, is admissib
in favor of the wife, or her child, in order to prove
common law marriage, even though the wife testifi
to the making, and the terms of the contract, in ver
de praesenti. In other civil and criminal cases, ev
dence that the parties have lived together as husba
and wife is always admissible. The authorities a
numerous to the effect that in a civil action, a marria
may be shown by reputation and continued cohabit
tion."

The Legislature of Ohio has by enactment prescribed
rule of evidence on the question of marriage.

"Section 11989. Evidence of Marriage. Proof of
habitation, and reputation of the marriage of t
parties, is competent evidence to prove such marria
and within the discretion of the court, may be sufficie
therefor."

We take the following from Ruling Case Law, Vol.
"Marriage," Section 62:

"Cohabitation and repute do not constitute a m
riage, but are only evidence tending to raise a p
sumption of marriage, of more or less strength acco
ing to the circumstances of the case, and which
creases with the lapse of time the parties are cohab
ing as husband and wife. The presumption of m
riage, from a cohabitation apparently matrimonial,
one of the strongest presumptions known to the l
but it is not conclusive and may be overcome by co
petent evidence."

**"An attempted ceremonial marriage in good fa
entered into by one of the contracting parties, e
though irregular or void will, through the act
agreement to be married and continuous cohabitat
establish a valid marriage at common law."**

This is the pronouncement of our Supreme Court in the case of Johnson v. Wolford, et al., 117 O. S., 136.

In the light of the evidence in the instant case construed in connection with the existing law, how stands the case at bar? The long-continued cohabitation as man and wife and generally so recognized in the community and even by at least one of Pat's nieces who addressed Mrs. Murnan as Aunt Grace, strongly supports the claim that Pat and Grace were husband and wife. The statement made to numerous friends that they were married in 1915 in Flagstaff, Arizona, presents the claim of a ceremonial marriage. **The evidence is very strong that Grace, at least, thought the marriage in Flagstaff was regular in every particular. She testifies that Pat attended to all the details. This means that he procured the license, secured the magistrate and took care of the papers. If there was any irregularity Pat might be in position to have knowledge thereof and Grace would not. We do not mean to say that there were any irregularities, but are merely canvassing the possibilities. Mere irregularities, even though they might deny a ceremonial marriage, would not refute a common law marriage under the decision of our Supreme Court in the case of Johnson v. Wolford, 117 O. S., 136.**

Does the fact that the marriage records in the Supreme Court of Flagstaff, Arizona, fail to show that any marriage license was ever issued to Pat Murnan or Grace Daugherty overcome the claim of marriage as advanced by the defendants? This evidence, coupled with the fact that no marriage certificate was introduced in evidence, presents a very strong denial of marriage, but it is not conclusive. In addition to the numerous statements made by Pat and Grace to close friends that they were married in Flagstaff, Arizona, we have the evidence of two witnesses who say

they saw the marriage contract. It is true the evidence o
the chauffeur who testifies that he saw the papers in th
clerk's office in Flagstaff, is of doubtful veracity. In hi
desire to help, his testimony as to what he saw and rea
is not supported by the evidence of what such document
would contain. We are not prepared to say that this wi
ness did not go to the clerk's office, nor would we want t
say that he did not see something, but even if this testimon
be ignored in its entirety we still have the testimony of a
other witness who says that in December of 1915, he sa
and read the marriage license between Maurice Pat Mu
nan and Grace Daugherty. Could it be possible under th
plan of operation in the office of the clerk of courts
Flagstaff, Arizona, that a marriage license was issued, b
never was recorded? The marriage license blanks were
identical form as the marriage record. These blanks we
not taken from the record and could be very readily ma
out and delivered to the contracting party with the idea
recording when the return was made by the person solem
nizing the marriage. Apparently, it was the practice
make the return on the same blank. It is in evidence th
sometimes the person performing the marriage ceremo
did not make the return himself, but entrusted the doc
ment to one or the other of the marrying parties to ma
the return by him or her. If the marriage contract conta
ing the marriage certificate was not in fact returned to t
clerk's office this might be a solution as to why the sa
never got into the record. It is also necessary to meet t
evidence that the cash book in the clerk's office fails
show any entry of the payment of the usual fee upon t
issuing of a marriage license. This is difficult to overcon
but may be the result of carelessness or even by desi

The individual who was clerk of the courts in 1915 is not now in office and his present residence is unknown. The Flagstaff magistrate who was in office in 1915 is now deceased.

Through the deposition of the present county clerk in Flagstaff there was given a very full and detailed description of the marriage records from 1912 to 1920. The volume is substantially bound and paged from 1 to 590. Each page contains the blank marriage license and blank marriage certificate. These pages are securely bound and are not loose-leaf. It was disclosed from the evidence that another license issued in June, 1915, did not get into the record until the early months of 1916. This disclosed that the system was not foolproof. If in the instance where the license was issued in June, 1915, it did not get into the records until 1916, it may be an explanation why in the instant case there is no record at all.

We are constrained to the view that plaintiff has failed to establish by a preponderance of the evidence that he and defendant group similarly related are surviving heirs of Maurice Pat Murnan.

We make the factual determination that Maurice Pat Murnan and Grace Daugherty were husband and wife at the death of Maurice Pat Murnan, and by reason thereof Grace Daugherty Murnan was the sole surviving heir.

Plaintiff's petition will be dismissed and costs adjudged against plaintiff-appellee.

Cause remanded to the Common Pleas Court for further proceedings according to law.

Geiger, P. J., concurs.

Hornbeck, J., dissents.

Geiger, P. J., concurring:

This case has been much discussed and generousl briefed and has resulted in voluminous testimony in th court below. Everyone who has had anything to do wit the case recognizes, not only the importance of the que tion to the parties to the present action, but the difficulti that surrounded its correct determination.

Each of the other judges of this court has examined th case and the evidence critically and have arrived at differe conclusions.

One has taken the position that the ceremonial marria alleged to have been consummated at Flagstaff, Arizon has been proved by the requisite quality of evidence.

Another member of the court has taken the position th there is not sufficient evidence to establish either the cer monial or a comman law marriage.

The evidence has been sufficiently reviewed and co mented upon so that no further comment is required.

While the authorities have been cited and quoted some length, it might be well to briefly restate a few of t principles, especially those relating to common law ma riages to support, if possible, the position that I take this matter.

In Umbenhower v. Labus, 85 O. S., 238, it is held:

> "An agreement of marriage in praesenti when ma by parties competent to contract accompanied a followed by cohabitation as husband and wife, th being so treated and reputed in the community a circle in which they move, establishes a valid marria at common law, * * *."

The opinion of the court, delivered by Price, J., revie in detail all the Ohio cases bearing upon the question a I shall not further comment upon them as this is so w done by Price, J.

In re Estate of Redman, 135 O. S., 554, is the latest pronouncement of the Supreme Court upon this subject. The opinion is by the court and there is a repetition of principles of prior decisions and it is there stated that it is well settled in Ohio that to establish a common law marriage all the essential elements of such a relationship must be shown by clear and convincing evidence. This is but a restatement of the former decisions of the court.

The case of Johnson v. Wolford, 117 O. S., 136, establishes the principle that where there has been an impediment preventing the validity of a ceremonial marriage, a valid marriage at common law may be established after the removal of the impediment.

In the case at bar it is contended on one hand that there was a valid ceremonial marriage in Flagstaff, Arizona. On the other hand, it is asserted that there was no such ceremonial marriage. It is conceded that if there was no such ceremonial marriage that the parties may by their subsequent declarations and conduct, properly proved, establish a common law marriage.

It will be recalled that a few days after the incidents occurring at Flagstaff the parties met, at Colorado Springs, friends from Columbus, Ohio, to whom they made the declaration of the fact that they were married, the statement being presumably based upon their supposition that there had been a legal ceremonial marriage.

After their return to Columbus, Ohio, they did not continuously cohabit as husband and wife until 1919 and during that period each made statements incorporated in their several deeds that they were unmarried. After 1919 they openly assumed the relation of husband and wife followed by cohabitation as such and being so treated and reputed

in the community and circle in which they moved, which relation continued until the time of the death of Pat. This, I believe, is sufficient to establish a common law marriage.

One of my associates agrees that a common law marriage might be so established if the statement of one of the parties themselves did not refute this relationship. It is pointed out by this judge that Grace, even after the death of Pat, stated in her deposition that there was no other marriage than the ceremonial marriage at Flagstaff and that such statement can not be reconciled with the claim of a common law marriage. After Grace continued to maintain that the only marriage relation was that established by the ceremonial marriage it is asserted that any claim to a common law marriage must necessarily fail.

After Grace's deposition was taken she died and after her death a witness was produced who stated, in effect, that he was shown a marriage certificate by Grace in the presence of Pat and that he read the same and commented upon the fact that her name as appearing thereon was not the name by which she was commonly known; to which Grace responded that she had, before the ceremonial marriage, secured a divorce from her former husband and had been restored to the name that then appeared in the certificate of marriage.

It must be remembered that each of these parties was engaged in such activities as would produce situations at variance with the normal life of those not so engaged. I am of the opinion that their actions between their visit to Flagstaff and their open cohabitation after 1919, during which time each repeatedly stated in their several deeds that they were single, could well be understood as arising from the doubtful occupations of each and that Grace's explanation that the deeds were so made because of their

several activities and their desire to avoid public comment, furnishes a natural explanation for their statements in this respect.

However, if each knew that they were not married in Flagstaff and each denied that relationship until 1919, the evidence discloses that thereafter they cohabited as husband and wife and by reason of their repeated statement to their friends of that relationship, they were so treated and reputed in the community and the circle in which they moved.

I do not believe that Grace's alleged statement that she was married at Flagstaff and that that was the only marriage contract into which they had entered would prevent a subsequent agreement even so late as 1919 which was followed by cohabitation as husband and wife and reputation as such in the community and circle of friends in which they moved as would prevent the consummation of a common law marriage.

I am of the opinion that the evidence produced might well establish either a ceremonial or a common law marriage and therefore I concur in the opinion so holding.

I likewise concur on all other questions.

Hornbeck, J., dissenting:

I am in agreement that the Backenstoe divorce decree may not be successfully attacked in this proceeding and that the property known as Graceland was owned by Grace at the time of her death.

The burden of proof would not affect my conclusion of the matter wherever it is placed. I appreciate, however, that it may become of prime importance upon a review of our judgment. It may be, that upon the whole case, the burden is upon the plaintiffs, but it is difficult to support

any theory which will enable the defendants, as representatives of Grace, to take a share of the estate here involved unless and until they have established that she, at the time of Pat Murnan's death, was his wife.

Judge Barnes in the majority opinion has set forth the most effective facts and inferences in support of a ceremonial marriage of which the record is susceptible.

Upon the controlling question, the record presents two distinct and different periods affecting the lives and the status of the parties involved and, in my judgment, two insurmountable obstacles to the maintenance of the claim that Pat and Grace were married.

The first period dates from on or about 1915 and ends in 1919. The second period begins in 1919 and ends with the taking of the deposition of Grace.

From June, 1915, the date of the alleged ceremonial marriage, until 1919, there is not one word of documentary proof tending to establish the marital relation between Pat and Grace. All of it is to the contrary. In the ordinary case this class of evidence would not be available to any considerable degree. Here we have it in abundance and it is compelling in probative effect because of the conflict and uncertainty in the word of mouth evidence. Some of the testimony of the holding out of these parties as husband and wife and especially of their living together as such, is of doubtful value. That relating to the vital question of the existence of a marriage certificate is, to say the least, not convincing. The marriage records in the court house at Flagstaff, Arizona, are of major importance, and afford no support whatever for the claim of a ceremonial marriage. The absence of such evidence may be explained only by imputing misconduct, or gross carelessness, to officials

who were charged with the duty of making and keeping these public records. Nothing in the evidence affords sufficient support for such a conclusion.

The records at Flagstaff present the first insurmountable obstacle and preclude, without respect to the burden of proof, a finding that the parties were ceremonially married. Other difficulties of less consequence appear. For instance, during this first period, every instrument, and there are many of them (12 deeds) signed by the respective parties, wherein their marital status is set out, refutes the claim of any marriage up to 1919.

The second period begins in 1919 when Pat acquired the farm in Worthington. From this time and until the taking of the deposition of Grace, every fact appearing in the evidence, written and oral, with one exception, affecting the status of these parties is to the effect that they sustained the relationship of husband and wife. Upon the acquisition of the farm, Pat deeded it to Grace, as his wife, and named it Graceland. They lived in the home at Graceland, as husband and wife, and openly and continuously so held themselves out to the public. Every deed executed by them, or either of them, recited that they were husband and wife. Pat made formal accounting to the Federal Government for income tax purposes and claimed exemptions as a married man. Their business and banking transactions were conducted as husband and wife.

It is inconsistent to say that there was a new and separate contract in praesenti to marry on or about 1919, if the parties then knew that they were ceremonially married. Even this handicap could be overcome by the force of the testimony and a contract implied in fact if it were not for a statement of Grace in her deposition.

Notwithstanding the trend of later decision wherein there has been stressed the necessity of an agreement in praesenti to constitute a common law marriage, this essential may be established by implication. If this were not so, no common law marriage could be proven unless some witness was available to state the terms of the agreement to marry.

The principle is well stated in the opinion in Bruner v. Briggs, 39 O. S., 480:

> "It is now too well settled to admit of dispute, that in all civil actions, when the rights to succession of an estate depends on the existence of a marriage, it may be proved by reputation, declarations and conduct of the parties."

The following authorities recognize this to be the law: 18 R. C. L., 426, 429, 433; Stewart v. Welch, 41 O. S., 483; Duncan v. Duncan, 10 O. S., 181; Wolverton v. State, 16 Ohio, 176; Howard v. Central National Bank, 21 O. App., 74; Jenkins v. Jenkins, 30 O. App., 336; Schwartz v. Schwartz, 13 O. C. C., 62; G. C. 11980.

But all the cases recognize that the contract to marry must appear and the effect of living together as husband and wife, and the holding out of this relationship to the public raises but a presumption of common law marriage which may or may not, under all the facts appearing, be sufficient to establish the marriage.

In most of the Ohio cases one of the parties to the marriage testify to the terms of the contract which it was claimed constituted an agreement in praesenti to marry. In no case has any court found a common law marriage to be proven wherein one of the parties expressly stated that no such contract of marriage existed. This brings us to the second insurmountable obstacle in this case,

ely, the statement of Grace in her deposition that e was but one marriage which was the ceremony per-ned in Flagstaff.

we hold that a common law agreement to marry is blished by the cohabitation and the holding out of e parties, we not only must disregard the testimony ling to establish ceremonial marriage, the most potent vhich is the statement of Grace, but also find either, she was mistaken, or misstating the truth, when she that there was but one marriage. This can not be nciled with the probabilities. Such an event as an eement to marry would make such an indelible im-sion upon the minds of the contracting parties, espe-ly the woman, as that they would never forget it. situation developed by the testimony of Grace gives lication to the law as announced in Dirion v. Brewer, nr., et al., 20 O. App., 298; Holmes v. Pere Marquette Co., 28 O. App., 297; Lumas v. Lumas, 26 O. App., ; the leading case of Umbenhower v. Labus, 85 O. S., and in re Estate of Redman, 135 O. S., 558, in all of ch cases the court emphasized the necessity that, to stitute a common law marriage, not only must there cohabitation as husband and wife, a holding out to public of that relationship, but these acts must follow agreement to marry. Re Estate of Redman, supra, special application. The court found that there had cohabitation between the parties, a holding out as band and wife, but that the parties agreed that mar-e not for them and that they did not desire the status. s latter fact does not appear in the instant case, but , as in the cited cases, the statement of one of the ies to the claimed common law marriage completely

refutes the existence of one of the essential elements to its establishment.

This case is unusual in its complexities and conflicts. No determination which may be made under the facts will completely satisfy the intellect. **The record may not be read without the impression that Pat and Grace were married**, but an analysis of the essential of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law.

APPENDIX II.

Decision, Finding of Fact—Court of Appeals.

(Rendered on the Seventh Day of April, 1942.)
(46 N. E. (2d), 664.)

By the Court:

The above-entitled cause is now being determined on three propositions (1) application for rehearing, (2) motion for new trial, (3) request for separate finding of facts and conclusion of law.

We will take these up in order.

First, the application for rehearing presents nothing but what was considered in the original opinion and therefore the same will be overruled.

The motion for new trial presents three separately stated and numbered grounds as follows:

> "(1) The findings, decision and decree are not sustained by any evidence, are contrary to the weight of the evidence and are contrary to law.
>
> (2) For several errors of law occurring at the trial prejudicial to the rights of the plaintiff-appellee and to which objections were made by plaintiff-appellee at the time.
>
> (3) For other errors manifest from the face of the record."

We find nothing new in the motion for new trial and we assume that it is presented as a requisite procedural step for further review in the Supreme Court.

The motion for new trial is overruled.

The application to separately state the findings of fact and conclusions of law was presented in time and the provisions of the rules of our court relative thereto complied with.

Counsel for appellees in compliance with such rule have presented to us a suggested finding of fact and determination of law and prior thereto submitted same to opposite counsel.

Counsel for appellant present their objections to the suggested findings and also for the consideration of the court submitted a draft of what they consider the court's findings should be.

The draft tendered by counsel for appellees in many particulars does not conform to the opinion of the court and consequently we cannot adopt same.

We find that the draft submitted by counsel for appellants does conform to our opinion and therefore the same is adopted in its entirety.

The following are our findings:

1. That Maurice P. Murnan died on or about May 12 1937, intestate and seized of the seventeen parcels or tract of real property described in plaintiff's petition, to which reference is made.

2. That said Maurice P. Murnan died intestate leaving his widow, Grace Murnan, surviving him.

3. That the personal property in the estate of Maurice P. Murnan is sufficient to pay all debts and claims against said estate.

4. That the nearest blood relations, but not next of kin of the said Maurice P. Murnan are the persons named as such in plaintiff's petition, to which reference is made except that Clara Collins named therein has since died leaving as her only next of kin the defendants, Margaret Fornan and Mary Martin; and that the correct name of the defendant, Margaret Fornan, is Margaret M. Catcher.

5. That on March 17, 1922, said Maurice P. Murnan by deed then delivered conveyed to Grace Daugherty (Backe

stoe) Murnan the real estate described in the cross-petition of Mary Meyer herein, to which cross-petition reference is made.

6. That as the surviving spouse and sole heir of said Maurice P. Murnan, the said Grace D. Murnan acquired under the statute of descent and distribution the title in fee simple to the seventeen parcels of land described in the petition herein, and of which she had possession from the date of his death on May 12, 1937, to the date of her death on November 16, 1939.

7. That after the death of said Grace D. Murnan, Raymond W. Kilbourne was duly appointed and qualified as the executor of her estate, and filed his answer therein to the cross-petition of Mary Meyer.

8. That since the death of said Grace D. Murnan, said Raymond W. Kilbourne, first as executor of the estate of said Grace D. Murnan and later as receiver duly appointed by the Common Pleas Court in this cause, has had the possession of the seventeen parcels of real estate described in the petition herein and collected the rents and profits therefrom until deprived of the possession thereof by the final decree and judgment of the Common Pleas Court in this cause, from which decree and judgment the several appeals herein were perfected to this court.

The following are findings in relation to the marriage between Maurice P. Murnan and Grace (Daugherty) Backenstoe Murnan:

9. That on and prior to July 15, 1915, said Maurice P. Murnan was a single man, his former wife having died in February, 1913, and Grace Daugherty (Murnan) was a single woman, having been divorced from her former husband, George Backenstoe, in November of 1912.

10. That in 1912, Grace Daugherty Backenstoe was the wife of George Backenstoe, and in August of said year filed an action against him for divorce in the Insolvency Court of Cuyahoga county, Ohio, wherein service was had against the defendant, George Backenstoe, by publication, an affidavit for publication now in the files having been executed by her attorney as notary; and thereafter the cause was heard by Judge Addams of said Insolvency Court and a judgment and decree entered by him, finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty.

11. That thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this case after it was brought into this court; and said divorce is therefore valid and binding and the said Grace Daugherty was a single woman thereafter, until married to Maurice P. Murnan.

12. That the **laws of Arizona** in force and effect in 1915 were as follows:

> "Section 3830. All regularly licensed or ordained clergymen, judges of courts of record and all justices of the peace of the several counties are authorized to solemnize the rites of matrimony between all persons legally authorized to marry."
>
> "Section 3833. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the clerk of the Supreme Court of the county in which one of the parties reside, or in which the marriage is to take place."
>
> "Section 3834. Any person desirous of marrying shall apply to the clerk of the Superior Court and shall receive from him a license directed to the persons authorized by law to solemnize the rites of matrimony

which shall be sufficient authority for any one of such persons to solemnize such marriage."

"Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."

"Section 3842. Every marriage ceremony must be performed in the presence of the officiating clergyman, judge or justice of the peace and at least two witnesses of lawful age, and a certificate evidence of such marriage must be signed by at least two such witnesses."

"Section 3844. The common law rule that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid **unless a license be issued as provided in this chapter, and a marriage solemnized by one of the persons authorized by law or by some one purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties, to be such.**"

"Section 1762. When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."

Said Section 1762 of the Revised Statutes of 1913 appears in substantially the same form in Section 23-316 of the Arizona Code of 1939, which was compiled with annotations under the supervision of the members of the Supreme Court of Arizona, as follows:

"Section 23-316. Marriage Certificate—Oral Proo of Marriage. * * * When the marriage is to be proved evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as mar ried persons, or any other evidence from which the fac may be inferred, shall be competent."

Notes to Decision.

"Common Law Rule. Statute is simply declaratory of the rule of evidence at common law. In re Terry's Estate, 58 Minn., 268, 59 N. W., 1013.

"Marriage. In prosecution for bigamy, evidence is admissible to prove the first marriage by witnesses that the marriage was performed in a foreign country by one, apparently an officer, and that the parties lived together in various places as husband and wife. Ford v. State, 21 Ariz., 567, 192 Pac., 1117."

13. That on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Coconino county at Flagstaff, and the marriage contract was entered into by said parties and the marriage solemnized by the justice of the peace in and for said county at Flagstaff, Arizona.

14. That there is now no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license with the certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license.

15. That the fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant

association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large show place on North High street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interest in each other's property and by all their conduct until the death of Maurice P. Murnan on May 12, 1937.

16. That the expressed desire of said parties to avoid any public declaration of their marriage and the giving of deeds in their single names from July, 1915, until her house of ill fame was closed in August, 1917, and while they lived at said house until August, 1919, was for the well authenticated reason that the association of her house in the public mind with his name would affect the taxicab business in which he was engaged.

17. That said Grace D. Murnan remained the wife of said Maurice P. Murnan until his death intestate on May 12, 1937, and as his surviving spouse was his sole heir to the seventeen parcels of the land described in the petition herein, of which she had possession until her death on November 16, 1939.

18. That the plaintiff and the other distant blood relations of said Maurice P. Murnan, as set forth in plaintiff's petition, are not the heirs of said Maurice P. Murnan and have no interest in the said seventeen parcels of real estate described in said petition, and are not entitled to the decree of partition as prayed for in said petition.

Geiger, P. J., and Barnes, J., concur.

New trial should be granted and findings of fact made to conform to dissent.

Hornbeck, J.

APPENDIX III.

Decision on Motion to Vacate Judgment—Court of Appeals.

(Rendered on the Twenty-seventh Day of July, 1942.)
(46 N. E. (2d), 667.)

Hornbeck, J.:

Submitted on (1) motion, dated June 24, 1942, of plaintiff-appellee and defendants-appellees, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Mathew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt, to certify the record to the Supreme Court of Ohio for the reason that the judgment herein is in conflict with the judgment pronounced upon the same question by the Court of Appeals of the Seventh District of Ohio in Lichtenberger v. Milligan, 63 O. App., 107; and

(2) Upon a supplemental motion of date June 30, 1942, asking that if motion No. (1) be overruled, in the alternative the court set aside and vacate its former judgments dated June 6, 1942, and April 4, 1941, to dismiss this appeal upon law and fact, for the reason that it is apparent upon the record that this case is consolidated and that this action under the pleadings is primarily an action to recover specific real property and is, therefore, not appealable on law and fact and that the court is and was without jurisdiction to hear this case de novo in chancery, and the judgments entered by the court are repugnant to the provisions of the Fourteenth Amendment of the United States Constitution.

The motion to certify must be considered in the light of the amendment to the Constitution of Ohio of 1912, Article

IV, Paragraph 6, the pertinent part of which is as follows:

> "Whenever the judges of a Court of Appeals find that a judgment upon which they have agreed is in conflict with the judgment pronounced upon the same question by any other Court of Appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination."

The test, then, is whether or not our judgment is in conflict with the judgment in the cited case upon the same question. House v. Stark Iron & Metal Co., 33 Abs., 355. The one and only instance prior to finding and judgment wherein we were required to consider the type of appeal under which this cause would proceed in this court was upon the motion to appellees for an order dismissing the appeal on law and fact, for the following specific reason: (1) That it is apparent upon the face of the record that the appeal was not perfected as required by Section 12223-6, General Code, in that the judgment was rendered in favor of the plaintiff upon an accounting in equity in the sum of $18,056.02; that the bond, by the order of the court, at the request of the appellants, was for $1,000.00, plainly contrary to the mandatory provision of said section. The second ground was directed to the failure of the appellants to file a bill of exceptions and could not in any manner effect the appeal on questions of law and fact.

This motion was considered upon the specific ground assigned, determined adversely to the movers and overruled. It is obvious that the court did not have presented to it, consider or adjudicate the questions now presented by the first motion herein. The question now urged and decided in the cited case, Lichtenberger v. Milligan, supra, and in other authorities cited by appellees, is brought to our attention for the first time on the motion to certify. The situation thus presented does not in our judgment permit

or require a certification of conflict. The first motion will, therefore, be overruled.

(Motion to Vacate Judgment.)

The second and alternative motion seeks an order vacating our final judgment and the order overruling the motion of appellees to dismiss the appeal on questions of law and fact because this court had no jurisdiction to entertain the appeal as upon questions of law and fact. The question has been voluminously briefed.

The question now raised on this motion was not at any prior time brought to the attention of the court. The suit of the appellees is in partition. They invoked such action in the Common Pleas Court and likewise in this court and, subject only to the objection set forth in the motion to dismiss the appeal on questions of law and fact, interposed no objection whatever to the jurisdiction of this court.

We consider the question upon the assumption, although not the concession, that the judgment was not appealable on questions of law and fact.

Jurisdiction is the power of a court to hear and determine the cause generally. This court by the Ohio Constitution is given capacity to entertain appeals on questions of law and fact, general jurisdiction to determine the subject matter of such appeals and to pass upon and determine its own jurisdiction. The test of jurisdiction is the court's power to act at all, not the correctness of its decision in so acting.

We recognize that jurisdiction of a court of the subject matter may be raised at any time, even after judgment but the test of jurisdiction of the subject matter is not so limited as contended for by appellee. Improvement Co. v.

Malone, 78 O. S., 238. **The question presented is no longer an open one in Ohio but has been decided adversely to the claim of appellees both before and since the Constitution of 1912.** 2 O. Jur., 562-4; Drake v. Tucker, 83 O. S., 97; Cadwell v. Cadwell, 93 O. S., 23; The Trumbull Savings & Loan Co. v. Saviers, et al., 115 O. S., 403; Union Trust Co. v. Lessovitz, 122 O. S., 406; Habecker v. Houck, 16 Abs., 58.

The second motion, of date June 30, 1942, will be overruled.

Barnes, J., concurs. Geiger, P. J., concurs in overruling of second motion; dissents from the overruling of the first motion.

(5)

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 103.

RALPH REA, ET AL.,
Petitioners,

vs.

WILLIAM B. DEVANNEY, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

JURISDICTION AND THE EXISTENCE AND DENIAL OF A SUBSTANTIAL FEDERAL QUESTION.

Respondents do not contend, but in substance admit that federal questions were raised and denied, in the state courts, as contended by petitioners. They merely contend that the questions are without substance.

They do not question the jurisdiction of this Honorable Court, on the record directly. If they do, it is only by indirection.

They do not attempt to aid the court by answering
explaining the applicable decision of this honorab
Court, as cited by petitioners.

This court has repeatedly declared that what is fu
faith and credit and what its extent is, is a question to
decided by this court.

This court has repeatedly decided that what cons
tutes due process is to be determined by this court wh
a federal question has been set up and denied.

In the state courts, respondents strenuously contend
that Grace Backenstoe and M. P. Murnan were marri
by a ceremonial marriage as provided by the laws of t
state of Arizona, in July, 1915, but now well knowi
that an examination of the record of this alleged ce
monial marriage will disclose that there never was a
marriage; that there is nothing to corroborate; that
license was ever issued and that therefore the judgm
of the state courts does violence to the constitutional
quirement that every state shall give full faith and cre
to the public acts and records of every other state
that:

> "A finding that the ceremonial marriage in A
> zona in 1915 was valid, was not necessary to
> Court of Appeals conclusion." (Respondents' br
> page 28.)

Obviously this statement is made in order to minim
the federal question involved, but respondents overl
the fact that unless there was a valid ceremonial m
riage under the laws of Arizona in 1915, their whole
falls and as a matter of fact Judge Barnes who wrote
opinion of the Court of Appeals based his whole opi
upon this fact, as follows:

"(The Law of Marriage.)

We start with the well-recognized principle that the lex loci is controlling on marriage contracts as well as all others. Under the laws of Arizona common law marriages are not recognized. Under the situation in the instant case it is our judgment that the marriage of Pat and Grace must be based on the proof of a ceremonial marriage or none at all." (Respondents' brief, page 61.)

Judge Geiger, who relies on a common law marriage, established as he says by holding out and reputation after 1919, uses that finding to say that it **"might"** corroborate a ceremonial marriage. To justify this statement he relies on Johnson v. Wolford, 117 O. S., 136, wherein the evidence is undisputed that all of the statutory requirements were complied with, followed by immediate and continuous cohabitation and the birth of a child, but because one of the parties was married and the other spouse subsequently died, the court held that after the death of such other spouse and the continued cohabitation of the parties who went through such irregular ceremonial marriage, that the subsequent holding out, cohabitation and reputation were sufficient to establish a valid marriage. **That is nothing like this case.**

Here there are illicit relations established; no proof of a valid statutory marriage; a separation after the alleged marriage and **for approximately four years each of the parties by documents represented themselves to be single and unmarried**; a deliberate, admitted concealment from the public; no children and none of the elements set forth in the case of Johnson v. Wolford, supra.

It is therefore evident the issues do depend entirely on a valid statutory marriage in Arizona.

The judgment entry, which contains the final draft of the findings of fact modifying as the court states therein, its former findings made by the court is as follows:

> "13. The marriage records in the Supreme Court for Coconino county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan or Grace Daugherty. There is no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license and a certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license." (Paragraph 13, Judgment Entry, Appendix.)

If the ceremonial marriage claimed to have been performed at Flagstaff, Arizona, in 1915, is to be abandoned, then under the testimony of Grace Backenstoe, while she was alive that:

> "There was no other marriage than the ceremonial marriage at Flagstaff." (Respondents' printed brief, page 70.)

the whole case of respondents falls.

Now in order to sustain this alleged ceremonial marriage, which counsel now say was not necessary, the Court of Appeals finds that there is no record of said marriage in the office of the clerk, "but that the absence of said record **may be** accounted for by the failure of"

(1) the justice of the peace? or

(2) the parties? or

(3) the clerk?

to do or not to do certain things.

In the opinion of Judge Barnes, he says:

> "This failure **might be** wilful or accidental." (Respondents' brief, page 54.)

There is no finding by the court as such as to who issued such license, when such license was issued, and where it was issued, to whom it was issued, what its form or contents are or were, because there was no testimony or evidence of such, merely hearsay and self-serving declarations of some third person. No authenticated essential document or its contents produced. Grace Backenstoe testified while alive she never had any. **Barnes alone** made a finding that a license was issued but he and the court refused to answer the interrogatories, the answer to which would have established the probative facts from which the ultimate fact of a marriage could only have been determined and found and which would have been determinative of the issue raised by the petition in ejectment against Grace Backenstoe and her answer and the reply of the plaintiff and this would have determined what judgment could be and must be made.

What may be, might be or could be, is mere conjecture, speculation and guess work and certainly can not be recognized by a court as a basis for the alleged ceremonial marriage.

His Honor Hornbeck, judge, makes a very clear statement as to the evidence, in the record, which attempts to establish a ceremonial marriage as follows:

> "Upon the controlling question, the record presents two distinct and different periods affecting the lives and the status of the parties involved and, in my judgment, two insurmountable obstacles to the maintenance of the claim that Pat and Grace were married.
>
> The first period dates from on or about 1915 and ends in 1919. The second period begins in 1919 and ends with the taking of the deposition of Grace.

From June, 1915, the date of the alleged ceremonial marriage, until 1919, there is not one word of documentary proof tending to establish the marital relation between Pat and Grace. All of it is to the contrary. In the ordinary case this class of evidence would not be available to any considerable degree. Here we have it in abundance and it is compelling in probative effect because of the conflict and uncertainty in the word of mouth evidence. Some of the testimony in the holding out of these parties as husband and wife and especially of their living together as such, is of doubtful value. That relating to the vital question of the existence of a marriage certificate is, to say the least, not convincing. The marriage records in the court house at Flagstaff, Arizona, are of major importance, and afford no support whatever for the claim of a ceremonial marriage. **The absence of such evidence may be explained only by imputing misconduct, or gross carelessness, to officials who are charged with the duty of making and keeping these public records. Nothing in the evidence affords sufficient support for such a conclusion.**

The records at Flagstaff present the first insurmountable obstacle and preclude, without respect to the burden of proof, a finding that the parties were ceremonially married. Other difficulties of less conquence appear. For instance, during this first period, every instrument, and there are many of them (12 deeds) signed by the respective parties, wherein their marital status is set out, refutes the claim of any marriage up to 1919. (Respondents' brief, pages 72 and 73.)

Judge Hornbeck then continues to analyze the relations between the parties after 1919 and the law in Ohio in relation to common law marriages and states as follows:

"In no case has any court found a common law marriage to be proven wherein one of the parties expressly stated that no such contract of marriage existed. This brings us to the second insurmountable

obstacle in this case, namely, the statement of Grace in her deposition that there was but one marriage which was the ceremony performed in Flagstaff.

If we hold that a common law agreement to marry is established by the cohabitation and the holding out of these parties, we not only must disregard the testimony tending to establish ceremonial marriage, the most potent of which is the statement of Grace, but also find either, that she was mistaken, or misstating the truth, when she said that there was but one marriage. This can not be reconciled with the probabilities. Such an event as an agreement to marry would make such an indelible impression upon the minds of the contracting parties, especially the woman, as that they would never forget it. The situation developed by the testimony of Grace gives application to the law as announced in Dirion v. Brewer, Admr., et al., 20 O. App., 298; Holves v. Pere Marquette Rd. Co., 28 O. App., 297; Lumas v. Lumas, 26 O. App., 502; the leading case of Umbenhower v. Labus, 85 O. S., 238, and in re Estate of Redman, 135 O. S., 558, in all of which cases the court emphasized the necessity that, to constitute a common law marriage, not only must there be cohabitation as husband and wife, a holding out to the public of that relationship, but these acts must follow the agreement to marry. Re Estate of Redman, supra, has special application. The court found that there had been cohabitation between the parties, a holding out as husband and wife, but that the parties agreed that marriage not for them and that they did not desire the status. This latter fact does not appear in the instant case, **but here, as in the cited cases, the statement of one of the parties to the claimed common law marriage completely refutes the existence of one of the essential elements to its establishment."** (Respondents' brief, pages 74 and 75.)

We respectfully submit that if the issue of a ceremonial marriage under the laws of Arizona was the only question at issue, it presents a substantial federal question on

the record under the full faith and credit provision of the Constitution of the United States.

IN AN EFFORT TO DEFEAT THE CLAIMS OF PETITIONERS, THE RESPONDENTS NOW SHIFT THEIR POSITION AS TO WHAT THE ORIGINAL ACTION UNDER THE PETITION IN THE COURT OF COMMON PLEAS WAS.

The respondents finding themselves embarrassed now for the first time claim that this action is an action to quiet title. In order to justify their claim that their case was a chancery case in the Court of Appeals and triable de novo under Article IV, Section 6 (page 42 our brief), providing that chancery cases only are triable de novo in Court of Appeals. The Court of Appeals does not have jurisdiction to try any other kind of a case on appeal de novo. Therefore, the change in their position since our brief was filed. A reading of the quotation from the petition in respondents' brief, refutes this new claim of theirs, to wit:

> "That since May 12, 1937, the defendant, **Grace D. Backenstoe, who claims an interest in said premises, has been in possession thereof, collecting therefrom its rents and profits,** has failed, neglected and refused to pay over, or in any manner account therefor and has threatened to and will continue to do so, to the irreparable injury of this plaintiff, **for which he is without an adequate remedy at law.**
>
> Wherefore, plaintiff prays that he may have partition of the premises hereinbefore described, according to law; that the defendant, Grace D. Backenstoe, **be required to set up** what interest, if any, she may have, in said premises and that **the same be declared null and void;** that this plaintiff may have **an accounting** of rents and profits issuing from said premises; that a **trustee ad litem be appointed** for

> the preservation of said premises and the rents and profits issuing therefrom; and that he may have such further relief in law and in equity as the court may deem just and proper in the premises." (Respondents' brief, page 12.)

We respectfully suggest to this Honorable Court to note that **there is not one word about quieting title** in any part of the petition or the prayer thereof. The facts alleged do not give a court of equity jurisdiction to decree a quieting of title under Section 11901, General Code of Ohio, which controls such practice.

As a matter of fact respondents have misstated the Ohio law on the subject of an action to quiet title. There was and is no allegation that plaintiff and heirs of M. P. Murnan were in possession. Grace Backenstoe was at the time of the commencement of this action **in possession** of the real property, the subject of the action and she so claimed and admitted, not as a co-tenant but as **an adverse claimant to all of the real property.**

Respondents quote from the findings of fact of Judge Turner of the Common Pleas Court in their attempt to show that this was an action to quiet title, but leave out the seventh finding of fact which is as follows:

> "7. That during her lifetime and subsequent to the death of Maurice Patrick Murnan said Grace Backenstoe Murnan collected the rents and profits from the real estate described in plaintiff's petition herein. That said Grace Backenstoe cared for and maintained said real estate and paid the necessary expenses incident to the care and maintenance of said real estate." (Transcript, page 75.)

We wish to point out that at the time of the trial of this cause Grace Backenstoe had died and the court had theretofore appointed a receiver who took possession of the

real estate from the executor of Grace Backenstoe estate and the same was in the custody of the court and that as a result of the judgment of the court at law partition was then ordered.

Respondents further say that only equitable remedies were included in the journal entry but fail to emphasize that the heirs of Grace Backenstoe Murnan are enjoined from setting up any claim not only to the title to said real estate but also to the **"possession"** thereof. First line on page 15, respondents' brief.

In this connection this court should read again the third syllabus in 57 O. S., 271, Raymond v. Ry. Company.

The law in Ohio as to an action to quiet title is set forth in the following section of the General Code:

> "Special Action—Division VII. Chapter 1, Actions Relating to Realty.
>
> Section 11901. General Code, Ohio. Action to Quiet Title.
>
> An action may be brought by a person **in possession** of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

This section of the General Code has been in effect for more than a hundred years.

It is a part of the settled course of judicial proceedings in Ohio, **that in order to give a court jurisdiction in equity** to quiet title to real estate, that the party must allege and prove that he is either in actual possession

himself, or by a tenant, or lessee, or by his representative and that he has the legal title thereto. This has always been the law in Ohio. If he is out of possession then the courts in Ohio and the United States have held that he must file an action in ejectment. If he claims as reversioner or remainderman then he can file an action to quiet title if out of possession. But if as stated in 57 O. S., 287-288, Raymond v. Ry. Company, page 43-46, the party claims the entire legal title and interest present and prospective, then his only right of action is at law in ejectment.

See:

Pomeroy Eq. (3rd Ed.), Sec. 1395;
Clark v. Hubbard, 8 Ohio, 382;
Douglas v. Scott, 2 Ohio, 194;
Lowery v. Lowery, 4 Ohio, 77;
Marsh v. Reed, 10 Ohio, 384;
Harris v. Paul, 37 Ohio App., 206, 174 N. E., 615.

Counsel for respondents certainly are charged with knowledge that this was the settled law in Ohio when they made an effort to convince this court that the petition as against them was an action in equity to quiet title.

That this Honorable Court follows the Ohio rule is evident from the following:

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon the title, and to quiet the possession of real estate, is to protect the owner of the legal from being disturbed in his possession or harrassed by suits in regard to that title, and the bill cannot be maintained without clear proof of both possession and legal title in plaintiff. Alexander v. Pendeeton, 8 Cranch, 462; Elliott v. Piersol, 6 Pet., 95 * * * as observed by Mrs. Justice Grier in Ortan v. Smith,

18 How., 263. Those only who have a clear legal and equitable title to land, connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. 18 How., 265. A person out of possession cannot maintain such a bill whether his title is legal is remedy at law by action in ejectment is plain, adequate and complete; and if his title is equitable, he must acquire the legal title and then bring ejectment. U. S. v. Wilson, 118 U. S., 86; Tussel v. Gregg, 113 U. S., 550."

Frost v. Spitley, 121 U. S., 552, 556.

"Where a party had an action in ejectment, the court declared that equity was without jurisdiction of a suit to determine the rights of the parties, the remedy at law being complete and adequate."

Syl. 3. Whiteside v. Nortan, 205 Fed., 5, 13.

The last paragraph of the judgment entry of the Court of Appeals (appendix), proves our contention that **the possession** of the specific real property was the crux of the action, when after dismissing plaintiff's petition and the cross petition of Mary Meyer it goes on to say:

"* * * that the defendant-appellants and other heirs and/or devisees of the said Grace D. Murnan be **restored to the possession** of the seventeen parcels of real estate described in the petition, **of which they were deprived by the judgment of the Common Pleas Court herein**, and that they have an accounting for all the rents and profits of which they were deprived by said judgment appealed from." (Appendix.)

However, respondents cite the case of Clark v. Clark, 110 Ohio State, 644, on the question of an action to quieting title, but fail to cite the third syllabi which is as follows:

"3. When the initial proceeding is statutory and not equitable, one defendant may not, by filing against another defendant a cross-petition which

states a chancery case, convert the whole proceeding into a chancery case."

Clark v. Clark, 110 Ohio State, 644.

But the answers in the case at bar **did not change the sole primary issue, i. e. the recovery of the possession at law of real estate,** respondents admit this when they say:

"Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition." (Respondents' brief, page 13.)

The opinion of the court in the Clark case, supra, sustains our position.

Furthermore it is claimed if the action is legal and not appealable that there was a waiver and that the court had jurisdiction to try a strictly legal action as a cause in chancery and they cite in support of that contention the case of Wagner v. Armstrong, 93 O. S., 443, but fail to cite the first syllabus which is as follows:

"1. Section 12225, General Code, purporting to vest the courts of appeals with jurisdiction in the trial of cases on appeal, is unconstitutional and void. **The jurisdiction of the courts of appeals in the trial of cases on appeal is expressly limited by the Constitution to chancery cases,** and this jurisdiction cannot be enlarged by the General Assembly." (Emphasis ours.)

Wagner v. Armstrong, 93 O. S., 443.

If the General Assembly can not enlarge this jurisdiction, it goes without saying that the court deriving its powers from the Constitution cannot do so.

It is further contended that the answers of Margaret Lunn and Mary Fallon affect the issue. Here is what petitioners say about these answers:

"There were other answers filed before and after her death but they did not alter or change **the only**

issue raised by the answer filed by Grace Backenstoe." (Petition for writ, page 5.)

Here is what counsel for respondents say about these answers:

> "* * * the joint answers of Mary Fallon and Margaret Lunn, **nieces of M. P. Murnan and named by the plaintiff as joint tenants with him, each answer merely setting forth that Grace Murnan was the widow and sole heir of M. P. Murnan and asking that the petition be dismissed.**" (Respondents' brief, pages 12 and 13.)

Significantly, we repeat, on the same page appears the following:

> "Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition." (Respondents' brief, page 13.)

Certainly, if the plaintiff's petition stated a cause of action at law to recover the possession of specific real property, no matter what he called it, all of the answers that were filed did not change the sole issue raised by the answers filed by Grace Backenstoe.

It is a part of the settled course of judicial proceedings in Ohio, that if a petition contains more than one cause of action, one legal and the other equitable, co-mingled, that such a situation is a mere irregularity and is not fatal to the rights of the parties, and that the only way to attack the irregularity, is by motion, not demurrer. Township of Hartford v. Bennett, 10 O. S., 441.

It is further a part of the settled course of judicial procedure in Ohio, that where there are two causes of action stated, one legal and the other equitable, the one which will control the rights of the parties and extinguish the other, if successful, is the primary action and the other secondary; what is the primary action is to be de-

termined by the issue made up by the pleadings of the parties; that if the primary action is legal that then an appeal at law only lies and such appeal does not carry up or open up the equitable action and vice versa; that whether a case is legal or equitable does not, as contended by respondents, depend on the understanding of counsel, or of the trial court, nor upon the form of the judgment rendered but upon the nature of the action as shown by the pleadings.

See

Raymond v. Ry. Co., 57 O. S., 271, 282, 289; page 43, our brief.
Salliday v. Webb, 2 O. C. C., 553; 20 C. D., 638.
Buckner v. Mear, 26 O. S., 514.
Ladd v. James, 10 O. S., 438.
James v. West, 67 O. S., 28, 49.
Carpenter v. Warrner, 38 O. S., 614.
McHenry v. Carson, 41 O. S., 212, 224.
Leach v. Clurd, 10 O. S., 149.
Albright v. Hawk, 52 O. S., 363.
Ireland v. Chenney, 129 O. S., 527, page 48, our brief.
Wall v. Federation Co., 121 O. S., 334, 337, page 45, our brief.

The respondents make a claim that the federal question presented by the petitioners in the state courts and which was denied there is not a question of substance. They also contend that the federal question does not control the judgment of the state courts. On account of the allegations contained in our petition and the state of the record, we believe it is sufficient to call this court's attention on this point to the following cases:

South Pacific v. Shuyler, 227 U. S., 601, 611.
Levering and Co. v. Morrin, 289 U. S., 103, 105.
Greenbay v. Patton, etc., 172 U. S., 58, 68.
Morris v. Gilmer, 129 U. S., 315, 326.
Blyth v. Henckley, 180 U. S., 333-337.

R. R. Co. v. Maryland, 87 U. S., 643.
Ward v. Board, 253 U. S., 17, 22, and
Carlson v. State of Washington, 234 U. S., 103, 106, from which we quote. This was a case where one of the assignments of error was the refusal of the Supreme Court to find a fact, which the party deemed material and essential to the federal register:

> "While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right. Southern P. Co. v. Schuyler, 227 U. S., 601, 611, 57 L. Ed., 662, 669, 43 L. R. A. (N. S.), 901, 33 Sup. Ct. Rep., 277, and cases cited."
>
> Carlson v. State of Washington, 234 U. S., 103.

As to the contention that the Court of Appeals being a court of general appellate jurisdiction and a court of record, it should be noted that is not true.

Its jurisdiction is specifically limited and defined by the Constitution since 1912. Before 1912 it had general appellate jurisdiction of all cases conferred by statute. The cases cited by respondents are cases decided before 1912.

From the case of Harris v. Hardeman we quote the following:

> "If as contended that defendant is estopped from pleading matter against the record * * * because it imparts verity.
>
> It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its judgment and proceedings are void, and therefore, the supposed record is no record. * * *
>
> Unless a court has jurisdiction it can never make a record which imparts uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not to therefore be estopped from proving any fact which goes to establish the truth of the plea alleging the want of jurisdiction."
>
> Harris v. Hardeman, 14 Howard, 334, 341.

Under U. S. v. Walter, 109 U. S., 258, 266, citing Bigelow v. Forrest, Ex parte Lange, 18 Wall., 163, Windsor v. McVeigh, the court said:

> "Although a court may have jurisdiction over the parties and the subject matter, yet if it makes **a decree which is not within the powers granted to it by law of its organization, its decree is void.**"
>
> U. S. v. Walter, 109 U. S., 258, 266.

This should be sufficient answer to the claim that because the Court of Appeals by Constitution in a proper case, has jurisdiction on appeal de novo of a chancery case, that any litigant can appeal any case to it and that the court, **may by arbitrary action,** hear the case as a chancery case, **even though the record shows it is exclusively a law case.**

We believe that all other questions presented by the brief of respondents is, for the purpose of the petition,

sufficiently stated in our opening brief and petition. We further believe that the jurisdiction of this court to hear and determine this case is fully established under the petition and that the writ should be allowed.

Respectfully submitted,

RALPH H. HENNEY,
MATTHEW L. BIGGER,
BENJAMIN F. LEVINSON,
Attorneys for Petitioners.

APPENDIX.

In the Court of Appeals of Franklin County, Ohio.

Ralph Rea, Plaintiff-Appellee, vs. Margaret Fornan, et al., Defendants-Appellants.	No. 3295, No. 3300, No. 3301, No. 3302.

Journal Entry.

This cause came on to be heard de novo upon the separate appeals upon question of law and fact, perfected by Raymond W. Kilbourne, as executor of the will of Grace D. Murnan (No. 3295), by Lawrence H., Fred, Frank L., Charles W., Joseph T., James and Edward McDonough and Anne Alpin (No. 3300), by Margaret Fallon Lunn (No. 3301); and by James Devanney (No. 3302), to the final orders, finding of fact, decree and judgment of the Court of Common Pleas of Franklin county, Ohio, in Cause No. 154482 in said court, and was submitted upon the pleadings filed in the Court of Common Pleas, upon the testimony taken therein, in accordance with the stipulation of the parties approved by the court, produced in the Common Pleas Court and supplemented by the testimony of witnesses taken as upon depositions in this court and exhibits, and upon oral arguments and briefs of counsel.

The above numbered causes of action having been considered as one proceeding, it is hereby on motion of the court ordered that all of the foregoing causes, to wit: 3295, 3300, 3301 and 3302 are hereby consolidated to one

cause and to be hereafter known as Cause No. 3295 on the dockets of this court.

And the majority of the court, namely, Geiger, P. J., and Barnes, J., being duly advised in the premises and after due consideration, rendered its written opinion, finding the issues in favor of said Raymond W. Kilbourne, executor, and said other defendant-appellants, and against Ralph Rea, plaintiff-appellee, Mary Meyer cross-petitioner herein, and other blood relations of Maurice P. Murnan, defendant-appellees herein.

And thereupon and thereafter said Ralph Rea and other appellees and Mary Meyer filed applications for rehearings and motions for new trial with requests for separate findings of fact and conclusions of law; and thereafter, as provided by Rule IX of this court; prepared and submitted their findings of fact, which, together with the objections and suggestions of appellants, were submitted to the court. After due consideration thereof, the majority of the court, namely, Geiger, P. J., and Barnes, J., overrules both said applications for a rehearing and said motions for a new trial, **but modifies its former findings of fact herein, and finds as its facts the following:** (Emphasis ours.)

1. That Maurice P. Murnan died on or about May 12, 1937, intestate and seized of the seventeen parcels or tracts of real property described in plaintiff's petition, to which reference is made.

2. That said Maurice P. Murnan died intestate leaving his widow, Grace Murnan, surviving him and that said parties had no children born to them.

3. That the personal property in the state of Maurice P. Murnan is sufficient to pay all debts and claims against said estate.

4. That the nearest blood relations, but not next of kin, of the said Maurice P. Murnan are the persons named as such in plaintiff's petition, to which reference is made, except that Clara Collins named therein has since died, leaving as her only next of kin the defendants, Margaret Fornan and Mary Martin; and that the correct name of the defendant, Margaret Fornan, is Margaret M. Catcher.

5. That on March 17, 1922, said Maurice P. Murnan by deed then delivered conveyance to Grace Daugherty (Backenstoe) Murnan the real estate described in the cross-petition of Mary Meyer herein, to which cross-petition reference is made.

6. That as the surviving spouse and sole heir of said Maurice P. Murnan, the said Grace D. Murnan acquired under the statute of descent and distribution the title in fee simple to the seventeen parcels of land described in the petition herein, **and of which she had possession from the date of his death on May 12, 1937, to the date of her death on November 16, 1939.** (Emphasis ours.)

7. That after the death of said Grace D. Murnan, Raymond W. Kilbourne was duly appointed and qualified as the executor of her estate, and filed his answer therein to the cross-petition of Mary Meyer.

8. That since the death of said Grace D. Murnan, said Raymond W. Kilbourne, first as executor of the estate of said Grace D. Murnan and later as receiver duly appointed by the Common Pleas Court in this cause, has had the possession of the seventeen parcels of real estate described in the petition herein and collected the rents and profits therefrom until deprived of the possession thereof by the final decree and judgment of the Common Pleas Court in this cause, from which decree and judg-

ment the several appeals herein were perfected to this court.

The following are findings in relation to the marriage between Maurice P. Murnan and Grace (Daugherty) Backenstoe Murnan:

9. That on and prior to July 15, 1915, said Maurice P. Murnan was a single man, his former wife having died in February, 1913, and Grace Daugherty (Murnan) was a single woman, having been divorced from her former husband, George Backenstoe, in November of 1912.

10. That in 1912, Grace Daugherty Backenstoe was the wife of George Backenstoe, and in August of said year filed an action against him for divorce in the Insolvency Court of Cuyahoga county, Ohio, wherein service was had against the defendant, George Backenstoe, by publication, and affidavit for publication now in the files having been executed by her attorney as notary; and thereafter the cause was heard by Judge Addams of said Insolvency Court and a judgment and decree entered by him, finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty.

11. That thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this cause after it was brought into this court; and said divorce is therefore valid and binding and the same Grace Daugherty was a single woman thereafter, until married to Maurice P. Murnan.

12. That the laws of Arizona in force and effect in 1915 were as follows:

"Section 3830. All regularly licensed or ordained clergymen, judges of courts of record and all justices of the peace of the several counties are authorized to solemnize the rites of matrimony between all persons legally authorized to marry."

"Section 3833. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the clerk of the Superior Court of the county in which one of the parties reside, or in which the marriage is to take place."

"Section 3834. Any person desirous of marrying shall apply to the clerk of the Superior Court and shall receive from him a license directed to the persons, authorized by law to solemnize the rites of matrimony which shall be sufficient authority for any one of such persons to solemnize such marriage."

"Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."

"Section 3842. Every marriage ceremony must be performed in the presence of the officiating clergyman, judge or justice of the peace and at least two witnesses of lawful age, and a certificate evidence of such marriage must be signed by at least two such witnesses."

"Section 3844. The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid unless a license be issued as provided in this chapter, and a marriage solemnized by one of the persons

authorized by law or by some one purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties, to be such."

"Section 1762. When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."

Said Section 1762 of the Revised Statute of 1913 appears in substantially the same form in Section 23-316 of the Arizona Code of 1939, which was compiled with annotations under the supervision of the members of the Supreme Court of Arizona, as follows:

"Section 23-316. Marriage Certificates—Oral Proof of Marriage—* * * When the marriage is to be proved, evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as married persons, or any other evidence from which the fact may be inferred, shall be competent."

Notes to Decision.

"Common Law Rule. Statute is simply declaratory of the rule of evidence at common law. In re: Terry's Estate, 58 Min., 268, 59 N. W., 1013."

"Marriage. In prosecution for bigamy, evidence is admissible to prove the first marriage by witnesses that the marriage was performed in a foreign country by one, apparently an officer, and that the parties lived together in various places as husband and wife. Ford v. State, 21 Ariz., 567, 192 Sec. 1117."

13. The marriage records in the Supreme Court for Coconino county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan, or Grace Daugh-

erty. There is no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license and a certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license.

14. That the fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large show place on North High street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interests in each other's property and by all their conduct until the death of Maurice P. Murnan on May 12, 1937.

15. Pat Murnan and Grace Backenstoe Murnan were well known underworld characters in Columbus, Ohio, and continuous law violators. Pat Murnan was the leading gambler and Grace Backenstoe Murnan the madam of a well established sporting house. The relations between these parties prior to July, 1915, were meretricious. The expressed desire of said parties to avoid any public declaration of their marriage and the giving of deeds in their single names from July, 1915, until her house of ill fame was closed in August, 1917, and while she lived at said house until August, 1919, was for the well au-

thenticated reason that the association of her house in the public mind with his name would affect the taxicab business in which he was engaged.

16. That said Grace D. Murnan remained the wife of said Maurice P. Murnan until his death intestate on May 12, 1937, and as his surviving spouse was his sole heir to the seventeen parcels of land described in the petition herein, of which she had possession until her death on November 16, 1939.

17. That the plaintiff and the other distant blood relations of said Maurice P. Murnan, as set forth in plaintiff's petition, have no interest in the seventeen parcels of real estate described in said petition, and are not entitled to the decree of partition as prayed for in said petition.

18. That to sustain the foregoing findings of fact, viz: that Maurice P. Murnan and Grace Backenstoe Murnan were husband and wife at the time of the decease of Maurice P. Murnan.

Geiger, P. J., finds that a common law marriage existed between the parties after 1919, established by their open assumption of the relation of husband and wife followed by cohabitation as such and were so treated and reputed in the community and circle in which they moved, which relation continued until the time of the death of Maurice P. Murnan and that this establishes a common law marriage between the parties, but might well corroborate a ceremonial marriage.

That Barnes, J., finds that on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Coconino county at Flagstaff, and the marriage contract was entered into by said

parties and the marriage was solemnized by the justice of the peace in and for said county at Flagstaff, Arizona, that there was one witness to said marriage.

That Hornbeck, J., finds that an analysis of the essentials of proof will not permit of the determination that Grace Backenstoe and Pat Murnan were married in any form recognized in the law.

And as its conclusions of law, the court finds that:

1. The plaintiff-appellee and other blood relations, defendant-appellees of Maurice P. Murnan, were not his heirs at law, have no interest in the seventeen parcels of real estate described in the petition, or in any of them, and are not entitled to the partition thereof.

2. Maurice P. Murnan at his death was not the owner of the real estate described in the cross-petition of Mary Meyer, and said cross-petitioner has no right to the partition of said real estate.

3. Grace D. Murnan became vested, as surviving widow and sole heir, with the title of the seventeen parcels described in the petition, and to this title in each parcel her heirs and/or devisees have succeeded, and are entitled to be restored to the possession of which they were deprived by the judgment of the Common Pleas Court herein appealed from.

4. The plaintiff-appellee and Mary Meyer, the cross-petitioner, are not entitled to an accounting for the rents and profits of said real estate from the estate of Grace D. Murnan, or from Raymond Kilbourne, the executor thereof, and are not entitled to the rents and profits therefrom which came into the hands of said Raymond W. Kilbourne as receiver; but all of said rents and profits belong to the estate and heirs of Grace D. Murnan.

5. The burden of proof is at all times upon the plaintiff-appellee and the defendants-appellees to establish their right to partition.

It is therefore ordered, adjudged and decreed upon the finding of fact by the Honorable Frank W. Geiger, P. J., that a marriage existed between said Maurice P. Murnan and Grace Backenstoe, that the majority of the court, namely, Geiger, P. J., and Barnes, J., find that at the death of Maurice P. Murnan, the said parties were husband and wife, to which finding of fact, His Honor, Judge Hornbeck, dissents; that the petition of the plaintiff-appellee and the cross-petition of Mary Meyer be, and the same are hereby dismissed; that the defendant-appellants and other heirs and/or devisees of the said Grace D. Murnan be restored to the possession of the seventeen parcels of real estate described in the petition, of which they were deprived by the judgment of the Common Pleas Court herein, and that they have an accounting for all the rents and profits of which they were deprived by said judgment appealed from. It is further ordered that the defendant-appellants herein recover their costs herein expended, taxed at $..... And this cause is remanded to the Common Pleas Court for further proceedings according to law and the findings hereinabove set forth.

To each and all of which the plaintiff-appellee and other defendant-appellees and Mary Meyer excepted and still except.

Frank W. Geiger, P. J.,
J. D. Barnes, J.,
Roscoe W. Hornbeck, J.

(Filed and entered June 6, 1942.)

the Honorable J. D. Barnes, J., of this Court and of